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No.

In the Supreme Court of the United States

ROBERT J. SMOTHERS,

Petitioner,

v.

GARY R. MCCAUGHTRY, WARDEN

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

JEREMY GASTON
Counsel of Record
Mayer, Brown, Rowe & Maw LLP
700 Louisiana St., Suite 3600
Houston, TX 77002
(713) 221-1651

Counsel for Petitioner

QUESTIONS PRESENTED

At petitioner's state homicide trial, the prosecution introduced evidence in its case in chief of petitioner's invocation of the Fifth Amendment in the face of police questioning to show his "consciousness of guilt." Then, in closing argument, the prosecution impeached petitioner's claim of self-defense, arguing that it had been fabricated because petitioner waited "five plus months" after arrest to "make a statement" that he acted in self-defense. The prosecution further claimed that petitioner's testimony fit the evidence and legal standard for self-defense because he had the assistance of retained counsel to help fabricate his testimony. Petitioner's trial counsel did not object to any of this. Petitioner was convicted of second-degree homicide and sentenced to forty years in prison.

On federal habeas review, the district court granted relief on petitioner's ineffective-assistance-of-counsel claim. The Seventh Circuit reversed, holding that petitioner's counsel had not been deficient because the prosecution's actions were permissible. The question presented is whether petitioner received ineffective assistance of counsel under *Strickland* v. *Washington*, 466 U.S. 668 (1984), which comprises three issues concerning the meaning of this Court's precedents:

1. Contrary to *Doyle* v. *Ohio*, 426 U.S. 610 (1976), *Wainwright* v. *Greenfield*, 474 U.S. 284 (1986), and *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993), may the prosecution support permissible impeachment by otherwise unconstitutional references to a defendant's post-*Miranda* silence and retention of counsel?

2. Contrary to *Wainwright* and *Griffin* v. *California*, 380 U.S. 609 (1965), may the prosecution introduce, in its case in chief, evidence of a defendant's government-induced invocation of the Fifth Amendment?

3. Contrary to *Strickland*, may a federal court refuse to consider a Sixth Amendment claim that is based on trial counsel's failure to make a state law objection to evidence that is independently inadmissible under the state constitution?

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PETITION FOR A WRIT OF CERTIORARI

Robert J. Smothers respectfully petitions for a writ of certiorari to review the Seventh Circuit's judgment in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-7a) is reported at 418 F.3d 711. The opinion and order of the district court granting habeas relief (App. 8a-52a) are unreported.

JURISDICTION

The Seventh Circuit entered judgment August 9, 2005 and denied rehearing and rehearing en banc October 19, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part that:

> "No person * * * shall be compelled in any criminal case to be a witness against himself * * *."

The Sixth Amendment to the United States Constitution provides in relevant part that:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part that:

> "No State shall * * * deprive any person of life, liberty, or property, without due process of law * * *."

STATEMENT

A. Introduction

Jay Meyer strangled petitioner Robert J. Smothers to the brink of unconsciousness, then tried to crush his windpipe. In resisting the attack, Smothers tried to summon help, made

two attempts at retreat, and employed three forms of non-lethal force, but none of this helped. Finally, while pinned on his back with Meyer sitting on him and still strangling him, Smothers managed to hit Meyer in the chest with the pocket knife. This stopped the attack but was fatal. Smothers was arrested, given *Miranda* warnings, and tried five months later for homicide.

In its case in chief, the prosecution introduced Smothers' tape-recorded invocation of the Fifth Amendment in the face of police questioning to show his "consciousness of guilt." See *infra* at pp. 7, 28. Then, in closing argument, the prosecution impeached Smothers' claim of self-defense by arguing that it had been fabricated since Smothers waited "five plus months" after arrest to "make a statement" that he acted in self-defense. See *infra* at pp. 8-9, 17-21. The prosecution also claimed that Smothers' testimony fit the physical evidence and legal standard for self-defense because he had the assistance of retained counsel during those "five plus months" to help fabricate his testimony. *Ibid.* Smothers' trial counsel did not object to any of this. Smothers was convicted of second-degree homicide and sentenced to forty years in prison.

On federal habeas review, the district court (E.D. Wis., Stadtmueller, J.) granted relief. In a 56-page opinion, the court concluded that Smothers' counsel was deficient under *Strickland* v. *Washington*, 466 U.S. 668 (1984), for failing to object to the prosecutor's impeachment under *Doyle* v. *Ohio*, 426 U.S. 610 (1976), which holds that any impeaching use of a defendant's post-*Miranda* silence violates due process.

The district court found that Smothers was prejudiced by counsel's deficient performance because "the prosecution's case hinged almost entirely on the credibility of Smothers' trial testimony" and there was "a fair probability that the jury would have been persuaded by the prosecutor's improper argument and believed [that] if Smothers had truly acted in self-defense, he would have notified the authorities of this fact prior to trial." App. 46a.

In an opinion by Judge Bauer, joined by Judges Easter-

brook and Manion, the Seventh Circuit reversed, holding that

(1) The prosecution's impeachment did not violate *Doyle* because it was directed at pre-*Miranda* conduct.

(2) The prosecution's case-in-chief use of Smothers' invocation of the Fifth Amendment was not unconstitutional because it was used for impeachment and not as substantive evidence of guilt.

App. 6a. And by failing to address the issue, the Seventh Circuit implicitly held that:

(3) Smothers could not base a *Strickland* claim on counsel's failure to make a state law objection to the use of Smothers' taped invocation of the Fifth Amendment (which was inadmissible for use in the prosecution's case in chief under the state constitution).

As explained herein, review is warranted because the decision below conflicts with this Court's precedents on these three issues and, in turn, creates multiple splits of authority among the lower courts as to what those precedents establish.

A. Facts

On March 23, 1996, petitioner Robert J. Smothers and his friend Jay Meyer spent the day riding around and drinking alcohol. D6, Tr. 9/11/96 at 31-36.[1] Around 6:00 p.m., they stopped at a local bar and drank some more. *Id.* at 36-37, 39. After two hours, Smothers badgered Meyer to leave so they could go eat dinner at Meyer's home, as previously planned. *Id.* at 27-28, 36-39. They left the bar and got into Meyer's truck, but the badgering had angered Meyer because he had not been ready to leave. *Id.* at 39. So rather than drive to Meyer's home for dinner, Meyer raced his truck out of the parking lot, spun his tires down the street, ran a red light and

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[1] The record is cited as D# where # is the district court docket number. Thus, "D7, Ex. M at 8" refers to page 8 of exhibit M to docket entry 7, whereas "D6, Tr. 9/11/96 at 2" refers to page 2 of the September 11, 1996 trial transcript attached to docket entry 6.

stop sign, and remained stone-cold silent as he drove Smothers home to drop him off without dinner. *Id.* at 39-40. After arriving at Smothers' apartment, they began arguing about the fact that Meyer was not bringing Smothers over to eat. *Id.* at 40-41. Smothers soon gave up and sarcastically told Meyer to "go home and beat your wife and kid," a reference to an earlier conversation where Meyer confided to Smothers that Meyer recently had been violent toward his family. *Id.* at 23-25, 41-42. Smothers' comment enraged Meyer, whose blood alcohol level was around 0.23 at the time. D6, Tr. 9/9/96 at 152. Meyer lunged toward Smothers, grabbed his throat, and began strangling him. *Id.* Tr. 9/11/96 at 42.

The fight was not an even match: Meyer was 41, 190 pounds, nearly six feet tall, and in good enough shape to have helped carry a pool table across the bar earlier. D6, Tr. 9/9/96 at 105, 137; *id.* Tr. 9/10/96 at 75-76. Smothers was 36, 5' 9", obese and out of shape at 230 pounds, and suffering from high blood pressure that required medication. D8 at 8; D6, Tr. 9/11/96 at 19, 53, 89, 91, 136-37.

As the two struggled, Meyer locked his arms and climbed on top of Smothers so Smothers' back was half-way [illegible] the seat and half-way against the door. D6, Tr. 9/11/96 at 42. All the while, Meyer kept his hands wrapped around Smothers' throat. *Id.* at 42-43.

In an effort to break Meyer's grip, Smothers employed several forms of non-lethal force. He tried hitting Meyer on the head with his fist. *Id.* at 70. He tried jabbing Meyer with his house keys. *Id.* at 43, 74-75. He also tried to summon help by honking the truck's horn with his foot. *Ibid.* Nothing worked, and Smothers' "eyes started getting dim, sort of like a television." *Id.* at 44-46, 70.

While being choked, Smothers managed to get out a pocket knife and cut Meyer's left hand and forearm. *Ibid.* When that did nothing, Smothers used the knife to cut Meyer's chin. *Id.* at 45-46, 74. Meyer briefly moved, and Smothers reached back, grabbed the door handle, and yanked it open. *Ibid.* They fell out of the truck, and Meyer lost his

grip on Smothers. *Id.* at 47, 75-76.

Smothers tried to retreat by running away, but Meyer caught up and tackled Smothers into a fence. *Id.* Smothers struggled free and tried to retreat again. *Id.* at 47-48. But Smothers was overweight and slow, and Meyer caught him. *Id.* Meyer pushed Smothers onto his knees, threw him on his back, climbed on him, and sat on his chest. *Ibid.* Meyer again began to strangle Smothers and also put a knee on Smothers' bicep so Smothers could not use the pocket knife. *Id.* at 48.

Thinking quickly, Smothers reached over, got the knife with his other hand, and began jabbing Meyer's abdomen, back, and legs. *Id.* at 49-50. But rather than deter, this further enraged Meyer, and he intensified his choke-hold. *Id.* at 49.

At this point, Smothers was still pinned on his back, and Meyer began pressing his thumbs into Smothers' throat; Smothers knew this could kill him, and he reacted with a stab to Meyer's chest. *Id.* at 49-50, 66-67, 90-91. Meyer got up, walked back to his truck, and got in. *Id.* at 50. Although this last stab stopped the attack, it hit Meyer's heart and was fatal. D8 at 4; D6, Tr. 9/9/96 at 142-43, 150.

Smothers scrambled up, ran to the truck, yelled at Meyer not to go anywhere because he would call an ambulance, then took Meyer's keys to make sure he did not leave. D6, Tr. 9/11/96 at 50. Smothers ran into his apartment and yelled for his neighbor Ms. Cook to call 911. *Id.* at 51. Because Smothers' throat hurt and he was worried about his blood pressure, he went to his apartment, got some water, and took his blood pressure medicine. *Ibid.*

Ms. Cook called 911 and gave the dispatcher the necessary rescue information. *Id.* at 26; D8, App. at 14. The 911 dispatcher, a police officer, asked to speak with Smothers. D6, Tr. 9/11/96 at 52; D8, App. at 15; D8 at 10.[2] Ms. Cook

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[2] In the district court, Smothers' statement that the dispatcher was a police officer was undisputed and taken as true since no evidentiary hearing was held. D8 at 10; D10 at 10; *United States ex rel.*

handed Smothers the phone, and the dispatcher asked Smothers what happened. D8, App. at 15; D6, Tr. 9/10/11 at 27. Smothers said someone had been stabbed and to send an ambulance. D8, App. at 15. The dispatcher then asked ***who*** stabbed Meyer. *Ibid.* Smothers refused to answer and said, "Well, I'm not ready to make no statement." *Ibid.* The police arrived while Smothers was on the phone. *Ibid.*; D8 at 5. They found Meyer in the truck and arrested Smothers. D6, Tr. 9/10/96 at 4-5, 7. The police subsequently read Smothers his *Miranda* warnings.[3] D8 at 5.[4]

B. Procedural History

1. ***Trial.*** Smothers was charged with first-degree intentional homicide with a dangerous weapon. D4, Ex. M at 2. At trial, the only direct evidence of events was Smothers' testimony. D6, Tr. 9/9/96 at 163. There also was no dispute that Meyer had made a serious attempt to strangle Smothers. Photographs revealed that Meyer had choked Smothers so hard that Meyer's finger impressions outlined Smothers' neck with abrasions. D6, Tr. 9/10/96 at 108-09; D6, Tr. 9/9/96 at 104. The evidence also showed that Smothers suffered abrasions to both knees and his lower back. D6, Tr. 9/10/96 at 108.

Other physical evidence was consistent with Smothers'

Mazenis v. *McBee*, 435 F.2d 18, 19 (7th Cir. 1970) (per curiam).

[3] *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

[4] In opposition, the State may insinuate, as it twice did below, that Smothers never received *Miranda* warnings. See State's Appellate Br. 10; State's Resp. to Smothers' Pet. for Reh'g or Reh'g En Banc at 3. If true, this would preclude relief on a *Doyle* claim under *Fletcher* v. *Weir*, 455 U.S. 603 (1982) (per curiam). But the State's insinuations misrepresent the state court record, for in a preliminary hearing, an arresting officer testified that he gave *Miranda* warnings to Smothers on the night of arrest and that Smothers then asked for an attorney. D8 at 5; D8, App. at 2; Smothers' Appellate Br. 22-23; App. to Smothers' Appellate Br. 5-6. The Seventh Circuit thus correctly ignored the State's contrary insinuations.

testimony that he did not use lethal force until his fist, keys, two attempts at retreat, and numerous lesser knife blows failed to stop Meyer's attack. Specifically, the medical examiner found twenty-three wounds on Meyer. D6, Tr. 9/9/96 at 140-43. Eighteen were superficial cuts, scrapes, and abrasions, while four were more substantial but non-life-threatening wounds to Meyer's abdomen, back, and legs. *Id.* According to the medical examiner, the only fatal wound was the one to the chest. *Id.* at 142-43. Other physical evidence corroborated Smothers' testimony that the lethal wound had been inflicted as a last resort after Meyer chased Smothers to the rear of the truck, sat on him, and strangled him again. See D6, Tr. 9/10/96 at 6-7, 18-19.

Finally, the fact that Meyer was in stronger physical shape – and feeling no pain given his 0.23 blood alcohol level – made it probable that Meyer's unremitting attack posed an imminent threat of death or great bodily harm to Smothers unless extraordinary force was used to stop it. D6, Tr. 9/9/96 at 137, 151, 155-56; *id.* Tr. 9/11/96 at 44-45.

Thus, to secure a conviction, the prosecution had to impeach Smothers. To do that, the prosecutor used Smothers' five months of post-*Miranda* silence to imply that Smothers had fabricated the "kill or be killed" nature of the struggle and used Smothers' government-induced invocation of his right to remain silent as substantive evidence of his guilt.

Specifically, in its case in chief, the prosecution played the 911 tape so the jury could hear Smothers tell the police officer that he did not want "to make no statement" after the officer asked an incriminating question. D6, Tr. 9/10/96 at 32; D8, App. at 15; D8 at 10. Then, in closing argument, the prosecutor made the jury aware of the fact that Smothers' trial testimony on September 11, 1996 was the first time Smothers claimed self-defense since invoking his right to "make no statement" on the night of the underlying events, March 23, 1996:

- "The 911 call. That shows a lot. That 911 call, that perhaps 30 second[s], 45 seconds where you hear Mr.

Smothers on the call, tells you volumes. Tells you volumes about the state of mind of Mr. Smothers and what happened that night."

- "The dispatcher talks to him a little bit later, and he says, well, I'm not ready to make no statement."
- "That point he says I'm not ready to make no statement."
- "Already Mr. Smothers in his own way is starting to think how he's going to extricate himself from this situation, a very difficult situation."
- "He's got a dead body out in his driveway. There's blood all over the place. He can't move that body. He can't move himself. He can't get rid of all the blood over himself."
- "He's already – his mind is working a little bit saying I'm not ready to make no statement."
- "That's March 23rd."
- "Yesterday, September 11th, a long time has passed since March 23rd * * *."
- "[S]ince then Mr. Smothers has been charged."
- "He's become represented by Mr. Rose [Smothers' trial counsel]."
- "He's had an opportunity to get and review the police reports, the witness statements, and now he's ready to make a statement. I was in danger of being killed. I believed my life was in danger."
- "That is his statement September 11th of 1996."
- "Mr. Smothers knows when he's testifying that the only other person who was involved in this incident is not going to contradict him."
- "He knows after five months, five-plus months that he can give a statement now, he can talk about that incident, and he knows that James Meyer is not going to stand up

and say, wait a minute, ladies and gentlemen, it didn't happen that way. It didn't happen that way at all."

- "[Smothers] has carte blanche. He has carte blanche to say whatever puts himself in the best position legally. The best position legally is that I was fighting for my life. I had nothing I could do. It was kill or be killed, and I got these scratches on my neck because I was being choked to death and I killed him because I had to, my last absolute resort."

D6, Tr. 9/12/96 at 43-46.

Then, moments before the jury began to deliberate, the prosecutor made a final remark designed to secure a conviction on at least some offense. Specifically, the prosecutor claimed that Smothers was only seriously contesting the first-degree charge and would "jump for joy" at a conviction on a lesser offense:

> "This is first degree intentional homicide. We're not going to give you [the jury] a pass in that regard. It's very easy and the defense could jump for joy if you come back and say he's guilty of a lesser included offense. This is reckless. This is just too much self-defense. They would jump for joy at that result, at that outcome; and it would send the wrong message, the implication would be wrong for the community, because this was first degree intentional homicide."

D6, Tr. 9/12/96 at 73-74. This argument was false because Smothers had maintained that he should be acquitted on all offenses. *Id.* at 67. Indeed, even before trial, Smothers rejected a plea bargain involving a lesser-included offense "without hesitation or any reservation." D8 at 41, 43.

The jury acquitted Smothers on the first-degree charge, but convicted him of the second-degree offense. D4, Ex. A. As the State has acknowledged, the only way for the jury to have reached that split verdict was to find that Meyer had attacked Smothers but that Smothers' use of lethal force was unreasonable because he had not actually been in danger of

imminent death or great bodily harm or because he did not actually need to use lethal force to stop the attack. State's Appellate Br. 39. Thus, contrary to Smothers' testimony but consistent with the prosecutor's impeachment, the jury decided that the struggle had not escalated into a true "kill or be killed" situation.

The trial court imposed a 40-year sentence, despite a lack of violence in Smothers' background. D4, Ex. A; D8 at i. Smothers' conviction was affirmed on direct appeal.[5]

2. ***State Post-Conviction Proceedings.*** The state court of appeals denied Smothers' state habeas petition alleging ineffective assistance of appellate counsel.[6] Smothers then filed a habeas petition in the state trial court alleging that trial counsel had been ineffective for failing to object when the prosecution (1) impeached him by reference to his post-*Miranda* silence and retention of counsel;[7] used his government-induced invocation of the right to remain silent to show guilt

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[5] *Wisconsin* v. *Smothers*, 586 N.W.2d 699, No. 97-2542-CR, 1998 Wisc. App. LEXIS 871 (Wis. App. Aug. 5, 1998) (per curiam) (unpublished), review denied, 589 N.W.2d 629 (Wis. 1998).

[6] D4, Ex. M (*Wisconsin ex rel. Smothers* v. *Pitzer*, No. 99-2933-W (Wis. App. Feb. 1, 2000) (unpublished)).

[7] In the Seventh Circuit, the State claimed that Smothers did not raise the retention-of-counsel aspect of issue (1) in the state court of appeals. State's Resp. to Pet. for Reh'g or Reh'g En Banc 7-8. In fact, Smothers raised the following claim: "Defendant was denied effective assistance of counsel at trial because trial counsel failed to object to the prosecutor's closing argument which suggested to the jury that defendant's guilt should be inferred based on defendant having retained his right to counsel * * * which violated the defendant's rights under the * * * 6th[] and 14th Amendments." D4, Ex. R at 20. And in support, Smothers argued that the prosecutor impermissibly asked the jury to "infer that Smothers had rem[a]ined silent during this [post-*Miranda*] period so that he could wait until an attorney * * * could help him fabricate a false self-defense story." *Id.* at 21.

in violation of (2) federal law and (3) state law; and (4) obtained a second-degree conviction by falsely claiming that Smothers would jump for joy at that result. D4, Ex. R. The trial court denied the motion, and the state court of appeals affirmed. *Wisconsin* v. *Smothers*, 642 N.W.2d 645, No. 00-3553, 2002 Wisc. App. LEXIS 238 (Wis. App. Feb. 20, 2002) (per curiam) (unpublished).

The state court of appeals rejected claim (1), holding that it was "legitimate and permissible" for the prosecutor to

> "argue[] that Smothers' ***failure to assert that he was attacked and acting in self-defense until after reviewing discovery materials and going to trial*** permitted an inference that he fabricated the defense to fit the other evidence in the case."

Id., at *8 (emphasis added).

The court of appeals rejected claims (2) and (3), holding that the prosecution's case-in-chief use of the 911 tape was "permissible" because

> "[n]othing in the 911 tape or in the prosecutor's closing argument stated or implied that Smothers' invocation of his right to silence demonstrated that he was guilty of the charged offense. * * * Although the prosecutor referred to Smothers' words indicating that he was not ready to make a statement, the prosecutor did so in the context of arguing that Smothers was trying to figure out a way to extricate himself from the situation."

Id. at *5-6 (internal paragraph mark omitted).

The court of appeals rejected claim (4), holding that it was proper for "the prosecutor to comment that Smothers would be pleased if convicted of a lesser offense than first-degree intentional homicide" because that comment occurred in the context of an argument that Smothers was guilty of the greater first-degree offense. *Id.* at *10-11. The Wisconsin Su-

preme Court denied review.[8]

3. ***Federal Habeas Proceedings.*** Having exhausted state post-conviction remedies, Smothers filed a habeas petition and supporting brief in federal district court that reiterated his four ineffective-assistance-of-counsel claims. D1; D8.[9] In a 56-page opinion, the district court (E.D. Wis., Stadtmueller, J.) held that the prosecution's references to Smothers' post-*Miranda* silence were unconstitutional under *Doyle* v. *Ohio*, 426 U.S. 610 (1976), because *Doyle* prohibits any impeaching use of a defendant's post-Miranda silence and because

> "[t]here can be no doubt that a jury hearing [the prosecutor's] arguments would understand them to be remarks on Smothers' failure to make any sort of statement about acting in self-defense during the five months prior to his trial."

App. 44a. The district court then held that the failure to object by Smothers' counsel was deficient under *Strickland* v. *Washington*, 466 U.S. 668, 688-94 (1984), because

> "[i]n a close case like this, which hinged greatly–if not entirely–on the credibility of Smothers' trial testimony, it would simply have been unreasonable for Smothers' trial counsel to let the prosecutor impeach Smothers' testimony with his post-arrest silence."

App. 44a. The district court next held that counsel's deficient performance prejudiced Smothers because

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[8] 650 N.W.2d 840 (Wis. 2002).

[9] In the Seventh Circuit, the State claimed that Smothers did not raise the retention-of-counsel aspect of the post-*Miranda* issue in federal district court. State's Resp. to Pet. for Reh'g or Reh'g En Banc 7-8. But in fact, Smothers raised the following issue: "Petitioner was denied effective assistance of counsel because trial counsel failed to object when the prosecutor used petitioner's right to counsel * * * against him as evidence to impeach his testimony as fabricated." D8 at 26.

> "[t]he evidence against Smothers was not overwhelming. There were no witnesses to the stabbing and Smothers' version of events was not implausible. In fact, the prosecution's case hinged almost entirely on the credibility of Smothers' trial testimony. In a case such as this one, there is a fair probability that the jury would have been persuaded by the prosecutor's improper argument and believed [that] if Smothers had truly acted in self-defense, he would have notified the authorities of this fact prior to trial. As such, the court is obliged to conclude there is a fair probability that but for the prosecutor's improper argument, the outcome of Smothers' trial would have been different. The court further concludes the probability that the outcome would have been different is sufficient to undermine confidence in the outcome."

App. 46a (star paging omitted).

The district court then held that the state court's rejection of Smothers' *Strickland* claim was contrary to clearly established federal law, and thus the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d)(1), did not bar relief. App. 47a-52a. The district court granted Smothers' habeas petition, and the State appealed. D18 [illegible]28.

In the Seventh Circuit, Smothers defended the district court's judgment based on the four issues raised in the district court. Smothers' Appellate Br. 18-54. The Seventh Circuit reversed in an opinion by Judge Bauer, joined by Judges Easterbrook and Manion. *Smothers* v. *McCaughtry*, 418 F.3d 711 (7th Cir. 2005).

As to issue (1), the Seventh Circuit held that the prosecutor's impeachment did not violate *Doyle* because it was directed at pre-*Miranda* conduct:

> "In essence, [the prosecutor's argument] asked the jury to contemplate why Smothers did not tell his neighbor or the 911 operator on the night of the incident the facts that he later testified to at trial."

App. 6a.

On issue (2), the Seventh Circuit held that the case-in-chief use of the 911 tape did not violate Smothers' federal right to remain silent because the tape was merely used for impeachment, rather than as substantive evidence of guilt, even though it was introduced before Smothers testified:

> "The prosecutor did not invite the jury to infer that Smothers was guilty based on his invocation of his right to silence; rather, he used the 911 tape to show that Smothers did not tell the 911 operator that he had been attacked, which permitted an inference that he made up his self-defense story to fit other evidence in the case."

Ibid.

Finally, the Seventh Circuit implicitly rejected issues (3) and (4) by not addressing them.[10] A timely petition for rehearing or rehearing en banc was filed. The Seventh Circuit called for a response from the State but denied rehearing.[11]

REASONS FOR GRANTING THE PETITION

Smothers' testimony established his innocence of any state law crime, but the prosecution obtained a conviction by using unconstitutional tactics: the prosecution's impeachment during closing argument violated (1) federal due process, whereas its use of the 911 tape during its case in chief violated (2) the Fifth Amendment and (3) the Wisconsin Constitution. The following summarizes these three issues and the

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[10] Under Seventh Circuit procedure, Smothers was entitled to raise these issues in support of the judgment because they had been presented in the district court. *Rose Acre Farms, Inc.* v. *Madigan*, 956 F.2d 670, 672 (7th Cir. 1992). Although page limits prevent further discussion of issue (4), Smothers submits that the false "jump for joy" argument violated due process under *Donnelly* v. *DeChristoforo*, 416 U.S. 637 (1974).

[11] *Smothers* v. *McCaughtry*, No. 04-3764, 2005 U.S. App. LEXIS 22923 (7th Cir. Oct. 19, 2005).

reasons for granting review:

1. During closing argument, the prosecution impeached Smothers' claim of self-defense by reference to his post-*Miranda* retention of counsel and the fact that he waited "five plus months" to "make a statement" that he acted in self-defense. Indeed, as the state court of appeals expressly found, the prosecutor impeached Smothers based on his "failure to assert that he was attacked and acting in self-defense until after * * * going to trial,"[12] which this Court has held to be an impermissible reference to post-*Miranda* silence. *Brecht* v. *Abrahamson*, 507 U.S. 619, 628-29 (1993).

Although the state court's finding was binding in federal court[13] and demonstrated a constitutional violation, the Seventh Circuit ignored the prosecutor's references to Smothers' post-*Miranda* conduct, apparently because they were commingled with an impeaching argument directed at pre-*Miranda* conduct. And to be sure, if a prosecutor impeaches a defendant by reference to pre-*Miranda* conduct and ***leaves it at that***, there ordinarily is no constitutional violation. But the prosecutor did not leave it at that. Rather, he went further and referenced Smothers' post-*Miranda* silence and retention of counsel to support his impeachment.

By excusing these post-*Miranda* references, the Seventh Circuit's decision conflicts with this Court's holdings that post-*Miranda* silence "will carry no penalty," *Doyle*, 426 U.S. at 618; that *Doyle* covers any references to a defendant's "failure to come forward with his version of events at any time before trial," *Brecht*, 507 U.S. at 628-29; that *Doyle* violations are not excused by related references to pre-*Miranda* conduct, *Brecht*, 507 U.S. at 628-29; and that *Doyle* covers the right to counsel, *Wainwright* v. *Greenfield*, 474 U.S. 284, 295 (1986).

In addition, the decision below conflicts with cases from

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[12] 2002 Wisc. App. LEXIS 238, at *8.

[13] 28 U.S.C. § 2254(e)(1).

the Fifth, Ninth, and Eleventh Circuits; the Eastern District of New York; and appellate courts in Wisconsin, Nebraska, and the District of Columbia. Specifically, each of those courts have held that *Doyle* prohibits impeaching language that indiscriminately hits pre- and post-*Miranda* silence, even if a prosecutor only "intends" to reference pre-*Miranda* conduct. See *infra* at pp. 22-23.

2. During its case in chief, the prosecution played the 911 tape so the jury could hear Smothers invoke his Fifth Amendment right to remain silent and infer that he must be guilty of something because he did not want to "make no statement." Although the Seventh Circuit has held that the substantive use of such evidence is unconstitutional under *Griffin* v. *California*, 380 U.S. 609 (1965), the court nevertheless rejected Smothers' claim by holding that the prosecution's use of the tape was mere impeachment. Under this Court's precedent, however, evidence of a defendant's silence cannot be classified as impeachment when used in the prosecution's case in chief. Rather, it is substantive evidence of guilt because the defendant has not yet testified. *Wainwright*, 474 U.S. at 292 & n.8. Further, any related constitutional violation may be deemed "especially egregious." *Ibid.*

3. In the Seventh Circuit, the State did not dispute that, as a matter of state law, the prosecution could not use Smothers' invocation of the right to remain silent in its case in chief. Yet the Seventh Circuit ignored this independent basis for relief based on the notion that Smothers' federal *Strickland* claim could not be premised on trial counsel's failure to make a meritorious state law objection. This conflicts with *Strickland*'s requirement that attorney performance be measured against "prevailing professional norms," 466 U.S. at 688, because in state prosecutions, such norms necessarily include making state law objections. The Seventh Circuit's decision also conflicts with decisions in four other Circuits recognizing that *Strickland* claims may be based on counsel's failure to make state law objections. See *infra* at p. 30.

Review should be granted because the Seventh Circuit's

decision conflicts with this Court's precedents and has created multiple splits of authority with other courts regarding what this Court's precedents establish. In addition, the decision below is the third in a line of habeas cases where the Seventh Circuit has ignored impeaching references to post-*Miranda* silence by creating exceptions to *Doyle*'s unqualified prohibition on any impeaching use of such silence.

Finally, as the district court found, Smothers has a strong claim of prejudice: the prosecution's case was based almost entirely on Smothers' credibility, and the prosecution's impermissible impeachment undercut that credibility with respect to the crux of his defense: the "kill or be killed" nature of the situation. Relatedly, the prosecution's improper use of the 911 tape likely misled the jury to believe that Smothers was "conscious of his own guilt," as the State candidly admitted was its purpose in using it. D4, Ex. S at 11. For these reasons, the petition for a writ of certiorari should be granted.

I. In conflict with this Court, three Circuits, and three state appellate courts, the Seventh Circuit ignored a prosecutor's unconstitutional references to a defendant's post-*Miranda* silence and retention of counsel because they were commingled with impeachment directed at pre-*Miranda* conduct.

Under clearly established Supreme Court precedent, a prosecutor may not impeach a defendant by reference to the defendant's post-*Miranda* silence:

> "[W]hile it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial."

Doyle, 426 U.S. at 618.

Here, Smothers' testimony established his innocence of

any state law crime because he was privileged to use lethal force in a "kill or be killed" situation. *Wisconsin* v. *Camacho*, 501 N.W.2d 380, 383 (Wis. 1993). But the prosecution obtained a conviction by using Smothers' post-*Miranda* silence to discredit the most crucial aspect of his testimony: the "kill or be killed" nature of the struggle. Specifically, the prosecution impeached Smothers by highlighting the fact that he had waited "five plus months" after arrest to "make a statement" that he acted in self-defense. To do this, the prosecution first drew the jury's attention to the fact that Smothers had invoked his right to remain silent on the night of the struggle:

- "[Smothers said] I'm not ready to make no statement. That's March 23rd." D6, Tr. 9/12/96 at 44.

And in the ordinary case, if a prosecutor comments on pre-*Miranda* silence ***and leaves it at that*** there is no constitutional violation.[14] *Jenkins* v. *Anderson*, 447 U.S. 231 (1980). But here, the prosecutor did not leave it at that. Rather, he proceeded to draw the jury's attention to fact that Smothers had "fail[ed] to come forward with his version of events at any time before trial," *Brecht*, 507 U.S. at 628-29:

- "Yesterday, September 11th, a long time has passed since March 23rd."
- "[N]ow he's ready to make a statement. I was in danger of being killed. I believed my life was in danger."
- "That is his statement September 11th of 1996."
- "[Smothers] knows after ***five months, five-plus months*** that he can give a statement now, he can talk about that incident * * *."

D6, Tr. 9/12/96 at 44-45 (emphasis added).

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[14] As explained in Parts II-III, the prosecution used Smothers' pre-*Miranda* invocation of the right to remain silent as substantive evidence of guilt in violation of federal and state law. Thus, whether that pre-*Miranda* conduct permissibly could have been used solely for impeachment is not at issue here because that did not occur.

As the district court concluded,

> "[t]here can be no doubt that a jury hearing those arguments would understand them to be remarks on Smothers' failure to make any sort of statement about acting in self-defense during the five months prior to his trial."

App. 45a.

Likewise, the state court of appeals also found that the prosecutor had impeached Smothers by reference to his "***failure to assert that he was attacked and acting in self-defense until after * * * going to trial.***" 2002 Wisc. App. LEXIS 238, at *8. But the state court of appeals then held that such impeachment was perfectly "legitimate and permissible." *Ibid.* That holding was directly contrary to *Brecht*, which holds that any reference to a defendant's "failure to come forward with his version of events at any time before trial, crosse[s] the *Doyle* line." 507 U.S. at 628-29. The district court thus correctly held that Smothers was entitled to relief under AEDPA. App. 50a-51a.

And the prosecutor did not stop with a negative comment on Smothers' post-*Miranda* silence. Rather, the prosecutor reinforced his impeachment with a reference to Smothers' post-*Miranda* retention of counsel as one of the ***means*** by which Smothers fabricated his "kill or be killed" testimony:

- "[S]ince [March 23, 1996] Mr. Smothers has been charged."
- "He's become represented by Mr. Rose [Smothers' trial counsel]."
- "He's had an opportunity to get and review the police reports, the witness statements, and now he's ready to make a statement. I was in danger of being killed. I believed my life was in danger. * * *"
- "He has carte blanche to say whatever puts himself in the best position legally. The best position legally is that I was fighting for my life. I had nothing I could do. It was

kill or be killed * * *."

D6, Tr. 9/12/96 at 44-45. As the State later conceded, the prosecutor's reference to Smothers' retention of counsel was a reference "to the inferred advice the attorney undoubtedly gave [Smothers] in trial preparation." State's Appellate Br. 32. Yet because *Miranda* warnings inform of the right to counsel as well as the right to remain silent, this part of the impeachment violated *Doyle* as well. See *Wainwright*, 474 U.S. at 295 (referencing the "constitutional right[] * * * to consult counsel" in holding that it is unconstitutional for the prosecution to make any "evidentiary use of an individual's exercise of his constitutional rights after the State's assurance that the invocation of those rights will not be penalized").[15]

And although the state court of appeals found that the prosecutor had impeached Smothers by reference to his "failure to assert that he was attacked and acting in self-defense until after * * * going to trial,"[16] and although that finding was binding in federal court,[17] the Seventh Circuit held that there had been no *Doyle* violation by ignoring the prosecutor's references to Smothers' post-*Miranda* silence and retention of counsel because the gist of the prosecutor's impeachment was directed at pre-*Miranda* conduct. App. 6a ("In essence, [the prosecutor] asked the jury to contemplate why Smothers did not tell his neighbor or the 911 operator on the night of the incident the facts that he later testified to at trial.").

To be sure, ***part*** of the prosecutor's argument went to

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[15] See also *United States* v. *Kallin*, 50 F.3d 689, 693 (9th Cir. 1995); *United States* v. *Daoud*, 741 F.2d 478, 480-81 (1st Cir. 1984); *United States* v. *McDonald*, 620 F.2d 559, 562-63 (5th Cir. 1980); *Ohio v. Leach*, 807 N.E.2d 335, 338 (Ohio 2004) (all holding that *Doyle* covers references to the retention of counsel).

[16] 2002 Wisc. App. LEXIS 238, at *8.

[17] 28 U.S.C. § 2254(e)(1) ("[A] determination of a factual issue made by a State court shall be presumed to be correct.").

Smothers' pre-*Miranda* conduct, like the fact that Smothers had not mentioned self-defense to the 911 police dispatcher. But the prosecutor did not "leave it at that." Rather, after comparing Smothers' testimony to his pre-*Miranda* conduct, the prosecutor continued his impeachment by reference to three events occurring after *Miranda* warnings but before trial:

- The "five plus months" that elapsed before Smothers was "ready to make a statement" or "talk" about the incident.
- Smothers' post-*Miranda* retention of counsel.
- Smothers' review of police and witness reports.[18]

By ignoring these post-*Miranda* events that included post-*Miranda* silence under *Brecht* and retention of counsel under *Wainwright*, the Seventh Circuit accepted the State's argument that such references are somehow excusable if they arise in the context of impeachment otherwise directed at pre-*Miranda* conduct.[19] The decision below thus conflicts with *Doyle*, which held that post-*Miranda* silence "will carry ***no*** penalty," 426 U.S. at 618 (emphasis added); *Wainwright*, which held that *Doyle* covers all rights listed in *Miranda* warnings, including the right to counsel, 474 U.S. at 295; *Brecht*, which held that *Doyle* covers any references to a defendant's "failure to come forward with his version of events at any time before trial," 507 U.S. at 628-29; and *Brecht*'s further holding that *Doyle* violations ***are not excused*** by otherwise permissible references to pre-*Miranda* conduct:

> "The first time petitioner claimed that the shooting was an accident was when he took the stand at trial. It was entirely proper * * * for the State to impeach his testimony by pointing out that petitioner had failed to

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[18] Regardless of any prohibition on references to Smothers' post-*Miranda* review of discovery materials, such references further show that the impeachment was not limited to pre-*Miranda* events.

[19] State's Appellate Br. 31-32.

> tell anyone ***before the time*** he received his *Miranda* warnings * * * about the shooting being an accident. * * * On the other hand, the State's references to petitioner's silence ***after that point in time***, or more generally to petitioner's failure to come forward with his version of events at any time before trial, crossed the *Doyle* line."

Brecht, 507 U.S. at 628-29 (emphasis added, citation omitted).

The decision below also conflicts with cases from the Fifth, Ninth, and Eleventh Circuits; the Eastern District of New York; and appellate courts in Nebraska, the District of Columbia, and Wisconsin, as all of those courts have held that *Doyle* is violated when broad impeaching language indiscriminately hits both pre- and post-*Miranda* silence:

- *United States* v. *Laury*, 985 F.2d 1293, 1301-04 (5th Cir. 1993) (general statement that "[the defendant] doesn't tell the FBI he has an alibi" violated *Doyle* because it could be construed as a comment on the defendant's "failure to come forward with his alibi" either before or after *Miranda* warnings).

- *United States* v. *Baker*, 999 F.2d 412, 416 (9th Cir. 1993) (prosecutor's "subjective intent" to limit comments to pre-*Miranda* silence "cannot save his overly broad statements" when "the actual language used contains no such limitation").

- *United States* v. *Negrete-Gonzales*, 966 F.2d 1277, 1281 (9th Cir. 1992) (*Doyle* violated where impeaching phrases, such as "any time that night," encompassed periods of time that included pre- and post-*Miranda* silence).

- *United States* v. *Gainer*, No. 04-15738, 2005 U.S. App. LEXIS 21315, at *9-10 (11th Cir. Sept. 30, 2005) (per curiam) (unpublished) (reference to defendant's failure to raise his defense until "a good year after [he had] been indicted" violated *Doyle* even though prosecutor "focused primarily on * * * pre-[*Miranda*] silence").

- *Farakesh* v. *Artuz*, No. 99-CV-3945 (JG), 2000 U.S. Dist. LEXIS 14977, at *34-35 (E.D.N.Y. Oct. 3, 2000) (designated for electronic publication) (*Doyle* violated where prosecutor failed to "explicitly[] limit[]" his argument to events in the pre-*Miranda* time frame); *ibid.* (rejecting State's contention that "a few improper comments on post-[*Miranda*] silence do not rise to the level of constitutional error" where the "bulk of the prosecutor's references were to defendant's pre-[*Miranda*] silence").

- *Nebraska* v. *Lofquest*, 418 N.W.2d 595, 597 (Neb. 1988) (*Doyle* violated where "a pre-*Miranda* and post-*Miranda* timeframe * * * exist" and "general references are made to a defendant's silence, which a reasonable juror could construe as including the post-*Miranda* silence period"); *ibid.* ("We cannot allow prosecutors to sidestep the *Doyle* protections by skirting the edge of the law with vague and imprecise references to a defendant's silence.").

- *Alexander* v. *United States*, 718 A.2d 137, 142 (D.C. App. 1998) (rejecting argument that prosecutor's remarks, "when taken in context," only referred to pre-*Miranda* silence because the prosecutor "repeatedly use[d] the terms 'never' and 'at no time' to describe [the defendant's] silence that night" and those "are broad terms that do not limit the scope of the comment or question to the pre-arrest or pre-*Miranda* time period").

- *Neely* v. *Wisconsin*, 272 N.W.2d 381, 386-87 (Wis. App. 1978) (*Doyle* violated where prosecutor urged jury to disbelieve defendant who waited "some ten months" before telling anyone his version of events because that comment "was directed at the defendant's silence from the day of the alleged murder to the day he testified at trial," a time period that included post-*Miranda* silence), *aff'd*, 292 N.W.2d 859 (Wis. 1980).

Likewise, the prosecutor's unqualified remarks in this case indicated that Smothers had waited more than five months after arrest to claim self-defense. As such, the above courts would have found a *Doyle* violation because virtually all of

that time period represented post-*Miranda* silence.

Nor was the Seventh Circuit's contrary decision an isolated occurrence, as that court has previously excused impeaching references to post-*Miranda* silence by state prosecutors in other habeas cases. See *Bieghler v. McBride*, 389 F.3d 701 (7th Cir. 2004); *Grancorvitz* v. *Franklin*, 890 F.2d 34 (7th Cir. 1989).

In *Bieghler*, the defendant presented an alibi defense, but the prosecution discredited it on cross-examination with questions like "Prior to the beginning of this trial, did you ever tell the story that you've told today to anyone besides your attorneys?" 389 F.3d at 704. Such questioning violated *Doyle* under *Brecht* because it referenced the defendant's "failure to come forward with his version of events at any time before trial," 507 U.S. at 628-29, to undermine the credibility of his testimony. But the Seventh Circuit found no *Doyle* violation because the prosecutor had not "equate[d] [the defendant's] silence with guilt." 389 F.3d at 705. This was an improper restriction of *Doyle* because *Doyle* prohibits any impeaching use of post-*Miranda* silence, and "impeachment" includes any attempt to "discredit[] the veracity of a witness," BLACK'S LAW DICTIONARY 768 (8th ed. 2004), not just arguments that equate silence with substantive guilt. See also *infra* at p. 28 (discussing this Court's distinction between substantive guilt and impeachment).

In *Grancorvitz*, the defendant claimed self-defense at trial, but the prosecution impeached him with references to his post-*Miranda* failure to complain of injuries he would have suffered had he acted in self-defense. 890 F.2d at 41-42. Such impeachment undermined the defendant's claim of self defense, but the Seventh Circuit found no *Doyle* violation, holding that *Miranda* warnings do not protect ***all*** silence, just silence regarding "the facts of a case" or "one's role * * * in the crime." 890 F.2d at 42. That holding cannot be squared with *Doyle*'s unqualified prohibition on the use of any post-*Miranda* silence to "impeach an explanation subsequently offered at trial." 426 U.S. at 618.

The present case thus represents yet a third instance in which the Seventh Circuit has excused impeaching references to post-*Miranda* silence in conflict with *Doyle*. For that reason and those stated below, review should be granted.

* * *

Federal habeas petitioners challenging state court conviction face many hurdles in obtaining Supreme Court review. Ordinarily, it is insufficient to show a conflict among lower courts because of the restrictions on collateral application of new rules of constitutional law. And even a conflict with this Court's precedents may be insufficient if it arises under circumstances of narrow application. Finally, even where a constitutional violation has occurred under established law, the need for review may be mooted by a lack of prejudice, as when substantial evidence of guilt exists.

Yet this case overcomes all of these hurdles, even on this first issue alone. The decision below conflicts with *Doyle*, *Brecht*, and *Wainwright*, and creates a split of authority among lower courts as to what those precedents establish. In such a situation, this Court has granted review to address the meaning of its precedents. See *Williams* v. *Taylor*, 529 U.S. 362 (2000) (granting review where federal court of appeals endorsed state court's misapplication of Supreme Court precedent). Moreover, as shown by the number of cases in which broad impeachment simultaneously hits pre- and post-*Miranda* silence, this case presents a recurring *Doyle* situation.

Finally, Smothers has a strong claim of prejudice. On the one hand, the jury's acquittal of Smothers on the first-degree charge showed that it generally believed Smothers' testimony (such as the fact that he had been attacked by Meyer rather than *vice versa*). On the other hand, the jury's conviction on the second-degree offense shows that it disbelieved those portions of Smothers' testimony showing that the struggle had escalated into a "kill or be killed" situation. Because that aspect of Smothers' testimony was stressed by the prosecutor's impeachment and because Smothers' testimony other-

wise established his innocence of any state law crime, there is a "reasonable probability" that the outcome of his trial would have been different if his counsel had objected to those impermissible tactics, *Strickland*, 466 U.S. at 694, as the district court correctly found, App. 46a.[20] For these reasons, the petition for a writ of certiorari should be granted.

II. In conflict with this Court, the Seventh Circuit held that the prosecution may use a defendant's government-induced invocation of the Fifth Amendment as substantive evidence of guilt during its case in chief.

When a police officer asks incriminating questions during an investigation, an individual may invoke his or her right to remain silent under the Fifth Amendment to the Constitution as incorporated against the States by the Fourteenth Amendment. *Kastigar* v. *United States*, 406 U.S. 441, 444-45 (1972). Here, Smothers invoked that right during the 911 call,[21] and was entitled to do so because the dispatcher was a police officer who asked an incriminating question.[22]

Under *Griffin* v. *California*, 380 U.S. 609, 615 (1965), Smothers' invocation of the Fifth Amendment in the face of police questioning could not be used as substantive evidence of his guilt. See *United States* v. *Burson*, 952 F.2d 1196, 1201 (10th Cir. 1991); *Coppola* v. *Powell*, 878 F.2d 1562, 1567-68

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[20] The Seventh Circuit did not disturb the district court's finding of prejudice. If this Court addressed the issue, it would conduct a *de novo* review, rather than employing AEDPA's standard of review, because the state court of appeals did not address prejudice. See *Wiggins* v. *Smith*, 539 U.S. 510, 534 (2003).

[21] At oral argument, the State conceded that Smothers invoked his right to remain silent while speaking to the 911 dispatcher. Seventh Circuit Oral Argument at 11:58-12:12 ("The 911 operator asked him who stabbed the victim, and Mr. Smothers said, 'I don't want to make a statement.' So he did actually exercise his right to silence at that point."), *audio available at* http://miniurl.org/0dC.

[22] See *supra* note 2.

(1st Cir. 1989); *United States ex rel. Savory* v. *Lane*, 832 F.2d 1011, 1017 (7th Cir. 1987) (all holding that, under *Griffin*, the prosecution cannot prove guilt using a defendant's pre-arrest refusal to answer incriminating police questioning).[23]

At Smothers' trial, however, the prosecution played a tape of the 911 call during its case in chief so the jury could hear Smothers invoke the Fifth Amendment. Because the tape was

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[23] Two other Circuits have addressed that issue and, while not deciding whether its resolution is compelled by *Griffin*, have held or assumed that valid invocations of the Fifth Amendment cannot be used as substantive evidence of guilt. See *Combs* v. *Coyle*, 205 F.3d 269, 283 (6th Cir. 2000); *United States* v. *Caro*, 637 F.2d 869, 876 (2d Cir. 1981). Two other Circuits have held that the Fifth Amendment prohibits substantive use of post-arrest silence. See *United States* v. *Whitehead*, 200 F.3d 634, 638 (9th Cir. 2000); *United States* v. *Moore*, 104 F.3d 377, 385 (D.C. Cir. 1997).

In opposition, the State may cite cases holding that certain instances of a defendant's silence were not protected by the Fifth Amendment. See *United States* v. *Osuna-Zepeda*, 416 F.3d 838 (8th Cir. 2005), petition for cert. filed, ___ U.S.L.W. ___ (U.S. Dec. 28, 2005) (No. 05-8370); *United States* v. *Oplinger*, 150 F.3d 1061 (9th Cir. 1998); *United States* v. *Zanabria*, 74 F.3d 590 (5th Cir. 1996); *United States* v. *Rivera*, 944 F.2d 1563 (11th Cir. 1991); *United States* v. *Harrold*, 796 F.2d 1275 (10th Cir. 1986). But in those cases, the silence at issue did not constitute an invocation of the Fifth Amendment in the face of criminal police questioning. Thus, while they involved "silence," they did not involve the "Fifth Amendment silence" at issue here. Similarly, this Court has held that a defendant's (1) silence may be used for (2) impeachment (3) after a defendant testifies (4) when that silence is not induced by the government, *Jenkins* v. *Anderson*, 447 U.S. 231, 240 (1980), but this Court has never suggested that a defendant's (1) actual invocation of the Fifth Amendment may be used as (2) substantive evidence of guilt (3) before a defendant ever testifies (4) when the Fifth Amendment has been invoked in the face of incriminating police questioning. And as explained in the text, three Circuits hold that *Griffin* establishes the contrary.

used during the prosecution's case in chief, its use was substantive (to show guilt) rather than impeaching (to discredit a testimonial claim of self-defense) because Smothers had not yet testified or made any prior claim of self-defense to police or prosecutors. Indeed, even the State admitted during state post-conviction proceedings that the prosecutor's purpose in using the 911 tape was to show Smothers' "***consciousness of guilt for his own actions***," D4, Ex. S at 11 (emphasis added), a substantive rather than impeaching purpose.

Likewise, under this Court's precedent, a case-in-chief use of a defendant's silence is substantive not impeaching. See *Wainwright*, 474 U.S. at 292 & n.8. There, this Court rejected the contention that the use of a defendant's silence as "affirmative proof in the case in chief" could be classified as "impeachment" and further explained that any related constitutional violation may be considered "***especially egregious***" because there is no risk "that exclusion of the evidence [would] merely provide a shield for perjury" since the defendant has not yet testified. *Ibid.* (internal quotation marks omitted, emphasis added, alteration in original).[24] Thus, the Seventh Circuit's holding that the 911 tape could somehow be used to "impeach" Smothers before he ever testified conflicts with *Wainwright*.

In opposition, the State may claim that the prosecution was ***not*** prohibited from using Smothers' invocation of the Fifth Amendment as substantive evidence of guilt. But as shown above, three Circuits have held that *Griffin* establishes that prohibition, and if they are right, Smothers is entitled to

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[24] In *Wainwright*, this Court did not decide if any exception to this rule would exist if silence were used in opposition to an affirmative defense. 474 U.S. at 292 & n.9. But any such exception would not apply here because it was the State's burden to disprove self-defense. D6, Tr. 9/12/96 at 13 (jury charge). Smothers' claim of self-defense was thus not an affirmative defense. See BLACK'S LAW DICTIONARY 451 (8th ed. 2004) (defining "affirmative defense" as one that "[t]he defendant bears the burden of proving").

relief under AEDPA. Moreover, because *Griffin*'s scope under AEDPA is an important question in its own right, the opportunity to address it here counsels further in favor of review because the issue has been analyzed extensively in the lower courts and those decisions uniformly favor Smothers in cases where a defendant's government-induced invocation of the Fifth Amendment in the face of police questioning is used as substantive evidence of guilt, as it was here. See *supra* note 23 (collecting cases). For these reasons, the petition for a writ of certiorari should be granted.

III. In conflict with this Court and four Circuits, the Seventh Circuit held that a *Strickland* claim cannot be based on counsel's failure to make a valid state law objection.

The Wisconsin Constitution provides a privilege against self-incrimination. Wis. Const. art. I, § 8 ("No person may * * * be compelled in any criminal case to be a witness against himself * * *."). And under state law, Smothers' government-induced invocation of his state right to remain silent could not be introduced in the prosecution's case in chief. See *Wisconsin* v. *Fencl*, 325 N.W.2d 703, 710, 711 n.9 (Wis. 1982) (holding that state law prohibits the substantive use of pre-arrest silence); *Mulkovich* v. *Wisconsin*, 243 N.W.2d 198, 202 (Wis. 1976) (holding that evidence admitted before a defendant testifies is substantive not impeaching).

In the Seventh Circuit, Smothers argued that his trial counsel had been ineffective under *Strickland* for failing to make any state law objection to the 911 tape. Smothers' Appellate Br. 44-51. The State never disputed this, but the Seventh Circuit implicitly rejected it as a basis for relief by failing to separately address it. Nor was this an oversight. Rather, after Smothers' counsel briefed the issue and expressly raised it again at oral argument,[25] a member of the

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[25] See Seventh Circuit Oral Argument at 24:58-25:18, *audio available at* http://miniurl.org/0dC.

panel responded that "We're not here to enforce state law."[26]

But as explained then,[27] a meritorious ***state*** law objection is a valid component of Smothers' ***federal*** *Strickland* claim because *Strickland* clearly establishes that counsel's performance must be judged in accordance with "prevailing professional norms." 466 U.S. at 688. And in state prosecutions, such norms necessarily include the raising of meritorious state law objections, as four Circuits recently have held. See *Young* v. *Dretke*, 356 F.3d 616, 629-30 (5th Cir. 2004) ("[A] constitutionally effective counsel would have moved to dismiss the indictment [on state law grounds concerning the timing of indictments] * * *."); *LanFranco* v. *Murray*, 313 F.3d 112, 118-19 (2d Cir. 2002) ("[T]he Sixth Amendment right to the effective assistance of counsel can be violated if counsel failed to raise a significant and obvious state law claim."); *Everett* v. *Beard*, 290 F.3d 500, 510 (3d Cir. 2002) ("Because [the defendant] was charged with murder under state law, we must necessarily reference the elements of accomplice liability for first-degree murder under Pennsylvania law in 1980 in order to evaluate the effectiveness of [his] trial counsel."); *Glover* v. *Miro*, 262 F.3d 268, 276 (4th Cir. 2001) (holding that ineffective assistance of counsel under federal law may be shown by proving that counsel's ignorance of state law protections and penalties resulted in prejudice).

Thus, even aside from the first two issues, Smothers is entitled to habeas relief because his counsel failed to raise any state law objection to the 911 tape. Because the decision below conflicts with four Circuits' recognition that *Strickland* claims may be based on counsel's failure to make valid state law objections, review should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[26] *Id.* at 25:18-25:21.

[27] *Id.* at 25:21-26:28.

JEREMY GASTON
Counsel of Record
Mayer, Brown,
Rowe & Maw LLP
700 Louisiana St., Suite 3600
Houston, TX 77002
(713) 221-1651

Counsel for Petitioner

JANUARY 2006

APPENDIX

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 04-3764
ROBERT J. SMOTHERS,

Petitioner-Appellee,

v.

GARY R. MCCAUGHTRY, Warden,

Respondent-Appellant.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 02 C 883—**J.P. Stadtmueller**, *Judge.*

ARGUED MAY 5, 2005—DECIDED AUGUST 9, 2005

Before BAUER, EASTERBROOK, and MANION, *Circuit Judges.*

BAUER, *Circuit Judge.* Robert Smothers stabbed and killed his friend, Jay Meyer, after an argument. At trial, Smothers claimed that Meyer was choking him, and the stabbing was in self-defense. During closing argument, the prosecutor contrasted Smothers' trial testimony with his demeanor and statements on a 911 call recorded shortly after the stabbing. The jury convicted Smothers of second-degree intentional homicide. Smothers petitioned for a writ of habeas corpus, which the district court granted, on the ground that Smothers' counsel was ineffective by failing to object to the prosecutor's closing argument. We reverse the grant of

the writ.

Background

On the evening of March 23, 1996, Smothers and Meyer were drinking at a local tavern. They stayed at the tavern for about two hours. Driving home in Meyer's truck, the two began arguing because Meyer had not wanted to leave the tavern so soon. Upon arriving at Smothers' home, the argument became more heated. Smothers eventually told Meyer to "go home and beat [his] wife and kid." According to Smothers, Meyer responded by starting to choke him. He testified that he first tried to fight Meyer off with a set of house keys, but then resorted to using a pocketknife. At some point, he opened the door of the truck and fell out. Meyer also exited the truck, caught Smothers, pinned him to the ground, and resumed choking him. Smothers testified that he used the knife several times to jab and poke at Meyer, hoping to stop the attack. Fearing for his life, Smothers finally stabbed Meyer in the chest with the knife. Smothers testified that Meyer appeared badly hurt, but got up and walked back over to the truck.

Smothers then ran into his apartment building and told his neighbor, Deborah Cook, to dial 911. Meanwhile, he went into his apartment to get a drink of water and take a blood pressure pill. When he left his apartment a few minutes later, Cook was on the line with the 911 operator and asked him if he wanted to speak to the operator. Smother took the phone; the following is a transcript of the call from that point:

SMOTHERS:	Hello.
911:	Bob, what happened?
SMOTHERS:	Well the dude got stabbed and he's here bleeding.
911:	Okay. Is he—is he still concious [*sic*]?
SMOTHERS:	Multiple stabs.
911:	Mul—he got stabbed multiple times?

SMOTHERS:	Right.
911:	Okay. Where is he? We got to get the rescue squad for him.
SMOTHERS:	6345- 26th Avenue.
911:	Okay. Okay. Bob, who stabbed him? Do you know who stabbed him?
SMOTHERS:	Well, I'm not ready to make no statement.
911:	Okay. Okay. Who, what's the name of the person that got stabbed?
SMOTHERS:	Um, well, is that relevant right now?
911:	Well, I just wanna know his name. What's his first name?
SMOTHERS:	James Meyer.
911:	Okay. That's fine. That's fine. And you're Bob.
SMOTHERS:	Yeah, I'm Bob.
911:	Okay. Now Bob, do you live in, do you live in the uh lower there?
SMOTHERS:	Okay. The ambulance is here then.
911:	Okay.
SMOTHERS:	I'll be off.
911:	Bob, stay on the line. Don't hang up.

[END OF CALL]

Smothers was arrested that evening and charged with first-degree intentional homicide. He chose not to make any statements about the stabbing until his trial. At trial, he took the stand and testified that he acted in self-defense, as detailed above. During closing argument, the prosecutor argued

that Smothers fabricated his version of events and was not really acting in self-defense that night. As part of this line of argument, the prosecutor commented on and compared Smothers' demeanor and words during the 911 call to his trial testimony. Specifically, the prosecutor made the following comments:

> The 911 call. That shows a lot. That 911 call, that perhaps 30 second, 45 seconds where you hear Mr. Smothers on that call, tells you volumes. Tells you volumes about the state of mind of Mr. Smothers and what happened that night.
>
> Was he out of breath? Was his voice raspy? Could he hardly speak from being choked? Was he upset, remorseful, frightened? He says the dude got stabbed. His—he got stabbed. It's not like I stabbed him. He got stabbed, like the knife somehow or somebody else stabbed him. I'm not responsible. He got stabbed. I didn't do it.
>
> Multiple stabs. He says right on the phone multiple stabs. He knew at that point that he had stabbed him multiple times. The dispatcher talks to him a little bit later, and he says, I'm not ready to make no statement. That point he says I'm not ready to make no statement. Already Mr. Smothers in his own way is starting to think how he's going to extricate himself from this situation, a very difficult situation.
>
> He's got a dead body out in his driveway. There's blood all over the place. He can't move that body. He can't move himself. He can't get rid of all the blood over himself. He's already—his mind is working a little bit saying I'm not ready to make no statement. That's March 23rd.
>
> Yesterday, September 11th, a long time has passed since March 23rd, since then Mr. Smothers has been charged. He's become represented by Mr. Rose. He's had an opportunity to get and review the police reports, the witness statements, and now he's ready to make a statement. I

> was in danger of being killed. I believed my life was in danger. That is his statement September 11th of 1996. Mr. Smothers knows when he's testifying that the only other person who was involved in this incident is not going to contradict him. He knows after five months, five-plus months that he can give a statement now, he can talk about that incident, and he knows that James Meyer is not going to stand up and say, wait a minute, ladies and gentlemen, it didn't happen that way.

The district court, relying on *Doyle v. Ohio*, 426 U.S. 610 (1976), determined that the prosecutor improperly used Smothers' post-arrest silence to impeach his testimony, violating the Due Process Clause of the Fourteenth Amendment. The court further determined that Smothers' counsel performed deficiently by failing to object to the prosecutor's line of argument.

Discussion

Smothers filed his habeas petition after April 24, 1996; accordingly, the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254, governs our review. Federal court may not issue a writ of habeas corpus unless the state court proceedings either: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in decision that was based on an unreasonable determination of the facts in light of the evidence presented in testate court proceeding. 28 U.S.C. § 2254(d). We find that the Wisconsin Court of Appeals' adjudication of Smothers' claim was not contrary to, or an unreasonable application of, clearly established federal law as articulated by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

To obtain relief, Smothers must show that the Wisconsin Court of Appeals' holding that his trial counsel did not render ineffective assistance was either contrary to, or an unreasonable application of *Strickland*. Under *Strickland*, a claim of

ineffective assistance requires Smothers to show that his counsel's performance was deficient and that it prejudiced his defense. 466 U.S. at 687.

In order to determine whether the Wisconsin court's holding regarding *Strickland* is correct, we must first determine whether the prosecutor's comments were impermissible. The district court concluded that the prosecutor's comments were in violation of *Doyle* and that Smothers' counsel's failure to object was deficient. In arriving at this conclusion, the district court held that the prosecutor's comments referred not only to Smothers' silence before he received *Miranda* warnings, but also to his post-*Miranda* silence. We disagree.

The prosecutor specifically compared Smothers' statements during his pre-*Miranda* 911 call to his trial testimony. The prosecutor drew a contrast between Smothers' reaction and comments at the time of the incident—"I'm not ready to make no statement"—to his testimony several months later, after he had the time to concoct a story to exonerate himself. Rather than *Doyle*, which invalidated impeachment based on post-*Miranda* silence, this case is more appropriately analyzed under *Jenkins v. Anderson*, 447 U.S. 231 (1980), and *Fletcher v. Weir*, 455 U.S. 603 (1982). The Court in *Jenkins* and *Fletcher* distinguished *Doyle* and established that use of pre-arrest and pre-*Miranda* silence to impeach defendant's credibility does not run afoul of the Constitution. That is what the prosecutor did in this case. In essence, he asked the jury to contemplate why Smothers didn't tell his neighbor or the 911 operator on the night of the incident the facts that he later testified to at trial. The prosecutor did not invite the jury to infer that Smothers was guilty based on his invocation of his right to silence; rather, he used the 911 tape to show that Smothers did not tell the 911 operator that he had been attacked, which permitted an inference that he made up his self-defense story later to fit other evidence in the case. This was an appropriate argument, and Smothers' attorney was not deficient in failing to object to it.

Conclusion

The Wisconsin Court of Appeals correctly applied *Strickland* because Smothers' counsel was not deficient; an objection to the prosecutor's closing argument would have lacked merit. We REVERSE the decision of the district court and REMAND with instructions to deny the writ of habeas corpus.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ROBERT J. SMOTHERS,

Petitioner,

v. Case No. 02-C-883

GARY R McCAUGHTRY, Warden,
Waupun Correctional Institution,

Respondent.[1]

ORDER

Petitioner Robert Smothers, proceeding *pro se*, has filed an application for the writ of *habeas corpus* with this court in the form of a petition as required by Rule 2(a) of the Rules Governing Section 2254 Cases. Smothers is currently confined at the New Lisbon Correctional Institution in New Lisbon, Wisconsin, and he is in custody pursuant to the judgment of conviction and sentence entered November 19, 1996, by the Circuit Court for Kenosha County, Wisconsin, for second-degree intentional homicide by use of a dangerous weapon. Smothers was sentenced to 40 years in prison for committing this crime. [*2]

FACTUAL BACKGROUND

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[1] At the time Smothers filed his petition, he was in custody at the Waupun Correctional Facility in Waupun, Wisconsin. He has since been transferred to the New Lisbon Correctional Institution in New Lisbon, Wisconsin. Although Gary McCaughtry is named as the respondent in this action, it is unclear whether he is still the state officer having custody of Smothers.

Robert Smothers and Jay Meyer had been friends for about 10 years. Their friendship consisted of hanging out and occasionally working odd jobs together. Smothers knew Meyer's family and would occasionally babysit for Meyer's son. Although it may appear to be a minor detail, it is important to note for purposes of this case that, according to Smothers, Meyer confided to Smothers during the course of their friendship that he occasionally had physical confrontations with his wife and beat his son.

On March 23, 1996, Smothers and Meyer spent the early afternoon together towing a vehicle across Kenosha County. After the tow was completed, Smothers and Meyer drove around in Meyer's truck drinking beer. At some point in time while they were driving around, Meyer, according to Smothers, told him he had a fight with his wife the day before. Around 6:00 p.m., Smothers and Meyer arrived at Nickie's Tropical Club, a local tavern. They had drinks in the bar and stayed there for about two hours.

While they were at Nickie's, Smothers and another patron, Charlie Rains, exited the bar and got into Rains' truck. Smothers testified Rains smoked pot in the truck while he (Smothers) just talked. Smothers specifically denied at trial that he smoked pot with Rains:

> Q: Did you smoke any pot? [*3]
>
> A: No, I didn't.
>
> Q: Why did you accompany Mr. Rains–this was the second time that you had met him, I understand that. Why did you go outside the bar to be with or accompany Mr. Rains while he smoked some pot?
>
> A: Well, because I thought it would get Jay [Meyer] to leave the bar sooner. Jay's the one that son of– you know, he was like egging me on to go out with him, go ahead, go ahead.

(Sept. 11, 1996, Tr., at 64.)

Smothers denied smoking marijuana with Rains a second

time at trial, even though the jailer's report, which Smothers appeared to have signed the night of his arrest, recorded he told the jailer he used beer and weed on the evening of March 23.

Q: You deny that you smoked marijuana that night there outside the bar?

. . . .

. . . .

A: Yes, I deny it.

Q: When you were brought into the jail that night, do you remember being asked a medical screening survey or questions about your health? General health?

A: I really don't remember.

Q: Do you remember being asked by the jailer bout [*sic*] any type of drugs you had used?

. . . .

. . . .

A: No, I really don't remember that

Q: Do you remember stating to the jailer that you had used weed and beer?

A: No, I don't remember that.

Q: Do you remember being asked when the date and time last used was and stating 1900 hours, March 23, 1996?

A: No, I don't remember that. [*4]

Q: Do you know what weed is?

A: Weed is marijuana.

Q: This is Exhibit 141, Mr. Smothers. I ask you to look at that. There's a backside also.

A: All right. (Pause.) Uh-huh, I can see this.

Q: Okay. Do you deny or do you not recall stating that to the jailer?

A: I don't recall stating that.

Q: Is that your signature Robert Smothers at the bottom?

A: Yes, it looks like it.

(Sept. 11, 1996, Tr., at 87-88.)

It is unclear whether it was before or after Smothers left with Rains, but at some point during his sojourn at Nickie's, Smothers asked Meyer if he wanted to leave and go to his (Meyer's) place to get something to eat. Meyer told Smothers he wanted just one more drink. After they had a few more drinks, Smothers again asked Meyer if he was ready to go. Meyer appeared as though he still wanted to stay, and Smothers reacted by putting on his jacket and heading for the door. Smothers testified Meyer did not get up and follow him right away, but eventually got up and left the bar.

Smothers and Meyer got into Meyer's truck, and Meyer, according to Smothers, appeared angry and spun the tires of his truck when he pulled out of Nickie's parking lot. Smothers testified Meyer ran a few stop lights and stop signs while driving him home. Smothers did not anticipate Meyer driving him home. He thought they were going to Meyer's house for dinner. He also did not [*5] anticipate Meyer becoming angry when he said he wanted to leave Nickie's. So, when they arrived at Smothers' place, Smothers told Meyer he had to question their friendship. According to Smothers, Meyer told him he was acting paranoid. Smothers testified he responded by telling Meyer to "get his meat out of my freezer and go home and beat his wife and kid." (Sept. 11, 1996, Tr., at 41.) When Smothers said this, it was about 8:00 p.m.

Meyer did not live to tell what happened next, but according to Smothers, the comment about beating his wife and kid caused him to lunge at Smothers and start choking him.

Smothers testified Meyer continued to choke him inside the truck. Smothers testified he tried to fight Meyer off with his house keys, and when that didn't work, he grabbed a knife in his pants' pocket and tried to fight Meyer back with that. Smothers testified while still being choked, he opened the door of the truck and fell out of the cab. According to Smothers, Meyer also exited the truck and grabbed him and began choking him again. The melee continued until Meyer, according to Smothers, had Smothers pinned down near the side of his house. Smothers testified Meyer was pushing his thumbs on Smothers Adam's apple and that he feared for his life. Smothers had been stabbing Meyer sporadically, but while he was pinned, he was able, with his free [*6] hand, to thrust the knife into Meyer's chest. Smothers testified that at this point, Meyer got up and got back into the truck.

Smothers realized Meyer was badly injured. He ran into his house (which was actually some sort of apartment) and told his upstairs neighbor, Deborah Cook, to dial 911. Meanwhile, Smothers testified he went into his apartment and got a drink of water and took a blood pressure pill. Smothers testified his throat was dry from the choking. When he exited the apartment, Cook was waiting for him with 911 on the line and asked him if he wanted to talk to the 911 operator. Smothers took the phone and began to talk. The following is a transcript of the 911 call:

911: Kenosha 911. What's your emergency?

COOK: Yeah. We got an emergency. The guy downstairs, I live upstairs, um, just stabbed somebody, and he's all full of blood and there's a guy outside all full of blood.

911: Okay. So there's two people full of blood?

C: Yeah. But one stabbed somebody, so he's all full of blood from the other guy.

. . . .

. . . .

911: Bob was the one who stabbed the person?

C: Right. That's what he said. He came in and told me to call 911.

911: Okay. Where's the person that got stabbed?

C: In-in the driveway (inaudible).

911: He's in the driveway. Where's Bob?

C: Checking-checking over that guy.

911: Bob's still in the driveway with him? [*7]

C: Yep.

911: Did he stab him with a knife?

C: Yeah. He-he has a knife in his hand and he's out by the truck.

911: He has a knife in his hands. Is he still there? Does he still have the knife?

C: Yeah. I think so.

. . . .

. . . .

911: Are they in the back of the driveway, toward the back of the house?

C: Yeah. Yeah.

911: (Talking to others-in the driveway in back of the house–(inaudible)). What's Bob's name.

C: Oh, the guy's (inaudible) Oh, he's, he's– Okay, yes Bob, okay Bob, calm down.

911: Okay. Is that Bob?

C: Yeah.

911: Okay. Let me talk to Bob.

C: Bob, come here. He wants to talk to ya.

SMOTHERS: Hello.

911: Bob, what happened?

S: Well, the dude got stabbed and he's here bleeding.

911: Okay. Is he–is he still conscious [*sic*]?

S: Multiple stabs.

911: Mul–he got stabbed multiple times?

S: Right.

911: Okay. Where is he? We got to get the rescue squad for him.

S: 6345 26th Avenue.

911: Okay. Okay. Bob, who stabbed him? Do you know who stabbed him?

S: Well, I'm not ready to make no statement.

911: Okay. Okay. Who, what's the name of the person that got stabbed?

S: Um, well, is that relevant right now?

911: Well, I just wanna know his name. What's his first name?

S: James Meyer. [*8]

911: Okay. That's fine. That's fine. And you're Bob.

S: Yeah, I'm Bob.

911: Okay. Now Bob, do you live in, do you live in the uh lower there?

S: Okay. The ambulance is here then.

911: Okay.

S: I'll be off.

911: Bob, stay on the line. Don't hang up.

[END OF 911 CALL.]

(Respondent's Answer, Ex. Q at Attachment A)

Smothers was arrested on March 23, 1996, and he chose to remain silent after his arrest. From the date of his arrest until the date of his trial, Smothers remained silent and did not offer any statements regarding the stabbing.

At trial, the prosecution called Deborah Cook as a witness. During the direct examination, the prosecution questioned her about what she witnessed on the evening of March 23. At the conclusion of her direct testimony, the prosecution played the 911 tape in its entirety. The prosecution did not make any verbal remark during its case-in-chief about Smothers' refusal to answer the question from the 911 operator concerning who stabbed Meyer.

Smothers took the stand at his trial and testified he stabbed Meyer in self-defense and believed his life was in danger. Smothers, as already noted, also testified he never smoked marijuana with Rains on the evening of the stabbing. [*9] The prosecution called Rains as a rebuttal witness, and Rains testified he and Smothers both smoked pot in his truck outside of Nickie's:

Q: Mr. Rains, what contact did you have with Mr. Smothers that night?

A: Well, we talked for a few minutes and that, and Jay [Meyer] asked me if I have any marijuana on me, and I said yes. He asked if I would take his friend out and get him high.

Q: Okay.

A: So, we went out. I just had a little bit. We might have had two or three hits off a bowl, and that was it. We came back in the bar.

Q: Did Mr. Smothers smoke some of the marijuana?

A: Yes, maybe two or three hits.

Q: Where did you smoke the marijuana at?

A: In my truck.

(Sept. 11, 1996 Tr., at 126.)

Smothers' attorney cross-examined Rains and asked him whether he was sure about his testimony in light of the fact a test done on Smothers' blood to determine whether there were drugs in his system came back negative. Rains said that would not change his testimony:

A: No, [Smothers] was in the truck with me.

Q: He was in the truck with you?

A: Yes. He might've not inhaled it, but he did use it with me.

Q: So, now what you're saying is that you're explaining this on the basis that maybe he didn't inhale.

A: Well, he might–I don't–I couldn't tell you what he did. I know I passed the pipe to him a couple times.

Q: And you didn't see him smoke it, did you? [*10]

A: Oh, he put it to his mouth. What he did with it after that I have no idea.

Q: Can you give us an explanation how it happens that there's no marijuana in his system?

A: I have no idea. We–for one thing, we didn't smoke that much.

(Sept. 11, 1996 Tr., at 130.)

At closing arguments, the prosecution argued there were several reasons why the jury should not believe Smothers' trial testimony about acting in self-defense. First, the prose-

cution argued the evidence obtained from the 911 tape was inconsistent with Smothers' trial testimony:

> The 911 call. That shows a lot. That 911 call, that perhaps 30 second, 45 seconds where you hear Mr. Smothers on the call, tells you volumes. Tells you volumes about the state of mind of Mr. Smothers and what happened that night.
>
> Was he out of breath? Was his voice raspy? Could he hardly speak from being choked? Was he upset, remorseful, frightened? He says the dude got stabbed. His–he got stabbed. It's not like I stabbed him. He got stabbed, like the knife somehow or somebody else stabbed him. I'm not responsible. He got stabbed. I didn't do it.
>
> Multiple stabs. He says right on the phone multiple stabs. He knew at that point that he had stabbed him multiple times. The dispatcher talks to him a little bit later, and he says, I'm not ready to make no statement. That point he says I'm not ready to make no statement. Already Mr. Smothers in his own way is starting to think how he's going to extricate himself from this situation, a very difficult situation. [*11]
>
> He's got a dead body out in his driveway. There's blood all over the place. He can't move that body. He can't move himself. He can't get rid of all the blood over himself. He's already–his mind is working a little bit saying I'm not ready to make no statement. That's March 23rd.

(Sept. 12, 1996, Tr., at 43-44.)

Second, the prosecution argued Smothers' statement at trial about acting in self-defense was not to be believed because he had five months to make the statement, and by that time, he had had an opportunity to retain an attorney and review the evidence against him. In addition, the prosecution argued Smothers' self-serving statement about acting in self-defense was of no value because it could not be corroborated:

> Yesterday, September 11th, a long time has passed since March 23rd, since then Mr. Smothers has been charged. He's become represented by Mr. Rose. He's had an opportunity to get and review the police reports, the witness statements, and now he's ready to make a statement. I was in danger of being killed. I believed my life was in danger. That is his statement September 11th of 1996.
>
> . . . .
>
> . . . .
>
> Mr. Smothers knows when he's testifying that the only other person who was involved in this incident is not going to contradict him. He knows after five months, five-plus months that he can give a statement now, he can talk about that incident, and he knows that James Meyer is not going to stand up and say, wait a minute, ladies and gentlemen, it didn't happen that way.

(*Id.*, at 44-45.) [*12]

Third, the prosecution argued Smothers lied when he testified he did not smoke marijuana with Rains on the evening of the stabbing, and the fact Smothers lied about smoking marijuana permitted an inference the he lied about acting in self-defense:

> Now, smoking marijuana in the context of a murder case is small potatoes. Small potatoes. Don't care about it; but it's important in this case because he lied to you. He lied to you. He like every other witness in this case got on that witness stand, raised his right hand and swore to tell you the truth; and I go back to my opening statement, my opening remarks, being a jury is a tough job. It's a tough job, and it's even tougher when people lie to you.
>
> You have to agree, the 12 of you, what were the facts, and it's hard when people don't lie; but when people

> come in and coldly, calculatedly [*sic*] lie to you, it makes your job that much more difficult; but Mr. Smothers did lie to you, and the fact that he lied to you, ladies and gentlemen, is crucial in this case.
>
> Because that throws everything, everything he said to you about what occurred in that driveway out the window as far as being able to believe him. You can't believe him.

(*Id.* at 50-51.)

During the prosecution's rebuttal closing argument, it admonished the jury to convict Smothers of first-degree homicide and not a lesser offense because a conviction for anything less than first-degree homicide would be a victory for Smothers: [*13]

> It's very easy and the defense could jump for joy if you come back and say he's guilty of a lesser included offense. This is reckless. This is too much self-defense. They would jump for joy at that result, at that outcome; and it would send the wrong message, the implication would be wrong for the community, because this was first degree intentional homicide. He caused the death. He did. He caused the death by an act which when he performed that act he was practically certain that it would cause the death and there was no legitimate self-defense. He didn't believe that he had to use that much force or that he was in imminent danger of death or great bodily harm.

(*Id.* at 74.)

The jury ultimately convicted Smothers of second-degree homicide, and Smothers has been challenging the conviction ever since. Smothers directly appealed his conviction on two grounds not relevant to the present case. The Wisconsin Court of Appeals affirmed his conviction, and the Wisconsin Supreme Court denied his petition for review in December 1998. In November 1999 Smothers, proceeding *pro se*, filed a petition pursuant to *State v. Knight*, 168 N.W.2d 540

(1992), on the ground his appellate counsel was ineffective on direct appeal. One of the grounds raised in the *Knight* petition concerned whether Smothers' appellate counsel should have argued there was insufficient evidence to support his conviction. The Wisconsin Court of Appeals, in the course of disposing of Smothers' claim, found there was sufficient evidence to support his conviction: [*14]

> Meyer suffered twenty-three cut and stab wounds, including two stab wounds to the chest, one to the abdomen, one to the mid-back and one to the back of the right thigh. Meyer had defensive wounds on his hands and forearms, suggesting that he could not have maintained the choke hold at all time as Smothers' [*sic*] testified.
>
> At the time of the assault, Meyer was very intoxicated. The medical examiner testified that Meyer's blood alcohol content was at a level that would have made walking problematic and impaired Meyer's coordination. While Smothers suggests that Meyer's intoxication anesthetized Meyer to the painful "warning knife cuts" and thus made the continued attack probable, that is only one inference to be drawn. The other reasonable inference is that Meyer's intoxication rendered him vulnerable to being thrown off balance with little effort. Smothers was five years younger than Meyer and outweighed him by forty to fifty pounds. A reasonable inference arises that Smothers could have overcome the intoxicated Meyer without the use of lethal force.
>
> The reasonableness of Smothers' belief that his own death was imminent is affected by the fact that Smothers' [*sic*] was agile enough during the initial choking to honk the truck horn, retrieve his knife, open it, and release the truck door. Smothers was able to get up immediately after Meyer retreated to the truck after the fatal wound. He was able to run to the truck and turn it off from the passenger side. He ex-

> hibited no difficulty in communicating to the neighbors he requested to call 911 or to the 911 operator. The evidence is sufficient to permit the inference that Meyer's choke hold was not life-threatening.

(Respondent's Answer, Ex., M, at 6-7.) The Wisconsin Supreme Court denied Smothers' petition for review in April 2000.

In June 2000, Smothers, proceeding *pro se*, filed a post-conviction motion arguing his trial counsel was ineffective within the meaning of the Sixth [*15] Amendment on a variety of grounds. First, Smothers argued his trial counsel was constitutionally ineffective when he did not object to the playing of the 911 tape during the prosecution's case-in-chief or to the prosecution's references to Smothers' refusal to answer the 911 operator's question concerning who stabbed Meyer during closing arguments. Second, Smothers argued his trial counsel was constitutionally ineffective when he did not object to the prosecution's use of his post-arrest silence to impeach his trial testimony about acting in self-defense. Third, Smothers argued his trial counsel was constitutionally ineffective when he did not object to the prosecution's statement that he was a cold, calculating liar during closing arguments. Fourth, Smothers argued his trial counsel was constitutionally ineffective when he did not object to the prosecution's statement that Smothers would jump for joy if convicted of anything other than first-degree homicide. Fifth, Smothers argues the cumulative effect of his trial counsel's blunders rendered the legal assistance constitutionally ineffective.

The Circuit Court for Kenosha County denied Smothers' motion in September 2000. The Wisconsin Court of Appeals affirmed the denial of the motion in February 2002. The Wisconsin Supreme Court denied Smothers' petition for review in July 2002. Smothers raises the same five grounds raised [*16] in his June 2000 Wisconsin state postconviction motion in his present federal *habeas* petition.

DISCUSSION

The federal *habeas corpus* statute was amended effective April 26, 1996, by the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA"). *Lindh v. Murphy*, 521 US. 320, 322 (1997) (AEDPA enacted on April 24, 1996). Applications for the writ filed after April 26, 1996, are governed by the AEDPA amendments. *Id.* at 336 (provisions of the AEDPA apply to *habeas* applications filed after the Act's effective date). Smothers' application was filed after April 24,1996, and his application is therefore governed by the AEDPA amendments.

The district court has the power to grant the writ of *habeas corpus* under 28 U.S.C. § 2241(a). *See* 28 U.S.C. § 2241(a) ("Writs of habeas corpus may be granted by . . . the district courts . . . within their respective jurisdictions."). In general, the district court shall not grant the writ unless one of the five conditions set forth in 28 U.S.C. § 2241(c) is satisfied. Section 2241(c) reads in its entirety:

> The writ of habeas corpus shall not extend to a prisoner unless–
>
> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or [*17]
>
> (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or
>
> (4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claim under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend on the

law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

Id.

When an application for the writ of *habeas corpus* is sought on behalf of a prisoner in custody pursuant to the judgment of a State court (*i.e.*, a "State prisoner"), the district court's power to grant the writ is more limited, however. Specifically, the district court shall not grant the writ when it is sought on behalf of a State prisoner unless it finds the following five requirements are satisfied:

(1) the application is timely filed within the meaning of 28 U.S.C. § 2244(d)(1);

(2) the State prisoner has fulfilled the exhaustion requirements set forth in 28 U.S.C. § 2254(b)(1);

(3) the State prisoner has not procedurally defaulted his ground for relief, or if he has, the State prisoner is able to show cause and [*18] prejudice for the procedural default or that there will be a fundamental miscarriage of justice if his ground for relief is not adjudicated on the merits;

(4) the State prisoner is "in custody in violation of the Constitution or laws or treaties of the United States" within the meaning of 28 U.S.C. § 2241(c)(3); and

(5) the provisions in 28 U.S.C. § 2254(d) do not preclude the district court from granting the writ.

First, the district court shall not grant the writ unless the State prisoner's application was timely filed within the meaning of 28 U.S.C. § 2244(d)(1). Section 2244(d)(1) provides in its entirety:

A 1-year period of limitations shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of–

(A) the date on which the judgment became final by the conclusion of direct review of the expiration of the time for seeking such review.

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the application was prevented from filing by such State action;

(C) the date on which the constitutional right was asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or [*19]

(D) the date on which the factual predicate of the claim or claims was presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1). The one-year statute of limitations under § 2244(d)(1) is a non-jurisdictional affirmative defense. *See Nardi v. Stewart*, 354 F.3d 1134, 1140 (9th Cir. 2004); *Kiser v. Johnson*, 163 F.3d 326, 328 (5th Cir. 1999); *Robinson v. Johnson*, 313 F.3d 128, 134-37 (36 Cir. 2002). Because it is an affirmative defense, the respondent is required to raise it in his answer. *See* Fed. R. Civ. P. 8(c); *see also* Rules 5 and 11 of the Rules Governing Section 2254 Cases. If the respondent does not raise this defense in his answer, the defense will be deemed waived. *See, e.g., Nardi*, 354 F.3d at 1141 . The court will not raise the defense *sua sponte*.[2] In sum, if the respondent does not raise this defense

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[2] The district court has the authority to raise the statute of limitations defense *sua sponte* when it conducts a preliminary review of the petition pursuant to Rule 4 of the Rules Governing Section 2254 Cases. However, once the respondent has filed an answer, the district court does not have the authority to cure the waiver of the statute of limitations defense under § 2244(d)(1). *See Scott v. Collins*, 286 F.3d 923,930 (6th Cir. 2002).

in his answer, the court will conclude the State prisoner has satisfied the requirement that his application be timely filed within the meaning of § 2244(d)(1).

Here, the court concludes Smothers has satisfied the requirement that his application be timely filed within the meaning of § 2244(d)(1). The respondent [*20] does not contend in his answer that Smothers' petition is untimely, and the argument is therefore waived.

Second, the district court shall not grant the writ unless the State prisoner has fulfilled the exhaustion requirements set forth in 28 U.S.C. § 2254(b)(1). Section 2254(b)(1) provides in its entirety:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that–
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1).

The exhaustion requirement set forth in § 2254(b)(1) are non-jurisdictional affirmative defenses. *Granberry v. Greer*, 481 U.S. 129, 131 (1987) (referring to the exhaustion requirement as a "defense"). Pursuant to Rule 5 of the Rules Governing Section 2254 Cases, the respondent is required to raise this defense in his answer. *Id.* However, the respondent's failure to raise this defense in his answer does not result in a waiver of the defense. *See* 28 U.S.C. § 2254(b)(3). Section 2254(b)(3) expressly provides that the "State shall not be deemed to have waived the exhaustion requirement . . . unless the [*21] State, through counsel, expressly waives the requirement." 28 U.S.C. § 2254(b)(3). If the State expressly waives the exhaustion requirement, the district court

still has the power to raise the defense *sua sponte* when it believes doing so best serves the interests of comity and federalism. *See Granberry*, 481 U.S. at 134-35. In sum, if the State expressly waives the exhaustion defense, and the court, in the exercise of its discretion, declines to raise the defense *sua sponte*, it will conclude the State prisoner has fulfilled the exhaustion requirements set forth in § 2254(b)(1).

Here, the court concludes Smothers has fulfilled the exhaustion requirements set forth in § 2254(b)(1). The respondent expressly waives the defense in his answer, and the court, after reviewing the record, does not believe the interests of comity and federalism require it to raise the defense *sua sponte*.

Third, the district court shall not grant the writ unless the State prisoner has not procedurally defaulted his claim, or if he has, is able to show cause and prejudice for the procedural default or that there will be a fundamental miscarriage of justice if his claim is not adjudicated on the merits. *See Thomas v. McCaughtry*, 201 F.3d 995, 999 (7th Cir. 2000). A State prisoner procedurally defaults his claim when he does not give the State courts a full and fair opportunity to address the merits of his claim and correct any errors of [*22] constitutional magnitude. *Wilson v. Briley*, 243 F.3d 325, 328 (7th Cir. 2001) (citing *O'Sullivan v. Boerckel*, 526 US 838, 844-45 (1999)).

The procedural default rule is a non-jurisdictional affirmative defense. *Trest v. Cain*, 522 U.S. 87, 89 (1997). As such, the respondent is required to raise the defense in his answer. *See* Fed. R. Civ. P. 8(c); *see also* Rules 5 and 11 of the Rules Governing Section 2254 Cases. If the respondent fails to raise the defense in his answer, the defense is waived. *Cossel v. Miller*, 229 F.3d 649, 653 (7th Cir. 2000). Even if the respondent waives the defense by failing to raise it in his answer, the court may still raise it *sua sponte* when it believes doing so serves the interests of comity and federalism. *Kurzawa v. Jordan*, 146 F.3d 435, 440 (7th Cir. 1998). The respondent may also expressly waive the defense. *See Hen-*

derson v. Thieret, 859 F.2d 492, 498 (7th Cir. 1988). When the respondent expressly waives the defense, the court may not raise it *sua sponte*. *Id.* (stating district court may not override respondent's purposeful decision to forego procedural default defense). In sum, if the respondent fails to raise the procedural default defense in his answer and the court, in the exercise of its discretion, does not raise the defense *sua sponte*, or if the respondent expressly foregoes the defense, the court will find the State prisoner has not procedurally defaulted his ground for relief. [*23]

Here, the court concludes Smothers has satisfied the requirement that he has not procedurally defaulted his constitutional claim. The respondent does not raise the procedural default defense in his answer and the court, after reviewing the record, does not believe the interests of comity and federalism require it to raise the defense *sua sponte*.

Fourth, the district court shall not grant the writ unless the State prisoner is in custody in violation of federal law within the meaning of § 2241(c)(3). Pursuant to 28 U.S.C. § 2254(a), the district court shall entertain an application for the writ on behalf of a State prisoner "only on the ground that he is in custody in violation of the Constitution or Laws or treaties of the United States." 28 U.S.C. § 2254(a). Section 2254(a) states in relevant part:

> . . . . [A] district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a). Stated differently, when the application for the writ is filed on behalf of a State prisoner, the district court may only grant the writ when the conditions set forth in § 2241(c)(3) are satisfied.

The conditions set forth in § 2241(c)(3) are satisfied when the district court concludes there has been a violation of federal law *and* that the violation [*24] played a causal

role in the State prisoner's custody. *See Aleman v. Sternes*, 320 F.3d 687, 690 (7th Cir. 2003). When the court considers whether the conditions set forth in § 2241(c)(3) are satisfied, it accepts as true all reasonable findings of fact by the State courts. *Shasteen v. Saver*, 252 F.3d 929, 933 (7th Cir. 2001). It considers all questions of law and mixed questions of law and fact *de novo*. *State ex rel. Robinson v. Buchler*, 936 F.Supp. 590, 595 (E.D. Wis. 1996).

If the court concludes there has been a violation of federal law, it must determine whether the violation played a causal role in the State prisoner's custody. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993); *O'Neil v. McAninch*, 513 U.S. 432, 444-45 (1995); *Aleman*, 320 F.3d at 690. If the respondent makes no attempt to show a violation of federal law has not played a causal role in the State prisoner's custody, he will have waived his right to do so. *See Jenkins v. Nelson*, 157 F.3d 485, 494 n.1 (7th Cir. 1998). Even if the respondent waives his right to do so, the district court may, in the exercise of its discretion, consider *sua sponte* whether the evidence shows this. *Id.*

Smothers claims he is in custody in violation of federal law because his attorney was ineffective within the meaning of the Sixth Amendment. A defendant's trial counsel is ineffective within the meaning of the Sixth Amendment when his performance is deficient and the deficient performance [*25] prejudiced the defendant's defense. *Strickland v. Washington*, 466 U.S. 668, 688-94 (1984). A trial counsel's performance is deficient within the meaning of the Sixth Amendment when his performance falls "below an objective standard of reasonableness." *Fountain v. United States*, 211 F.3d 429, 434 (7th Cir. 2000). To show his trial counsel performed deficiently, the defendant must first specifically pinpoint the act or omission that constituted the alleged deficient performance. *United States v. Trevino*, 60 F.3d 333, 338 (7th Cir. 1995). Second, he must overcome the strong presumption that the act or omission pinpointed was a reasonable, tactical trial strategy. *United States v. Ashimi*, 932 F.2d 643, 648 (7th Cir. 1991). It is especially difficult to overcome this presumption

when there is nothing in the record to explain why the trial counsel did what he did. As the Seventh Circuit explained in *United States v. Trevino*:

> Claims that an attorney was ineffective involve inquiries into the motivation behind an attorney's trial strategies. This in turn requires facts which are usually not contained in the trial record. Without such facts trial counsel's alleged lapses or errors will be presumed tactical moves, flawed only in hindsight.

60 F.3d at 338; *see also Valenzuela v. United States*, 261 F.3d 694, 698-99 (7th Cir. 2001) (in absence of any evidence to explain the trial counsel's decisions, the court is left to presume that they fell "'within a wide range of reasonable trial strategies") (quoting *United States v. Lindsay*, 157 F.3d 532, 535 (7th Cir. [*26] 1998)). A tactical trial strategy is reasonable when competent attorneys might honestly disagree as to the merits of the trial counsel's act or omission. *United States v. Balzano*, 916 F.2d 1273, 1294 (7th Cir. 1990) (quoting *United States v. Adamo*, 882 F.2d 1218, 1227 (7th Cir. 1989)). The court must also be mindful that when determining whether an act or omission was a reasonable, tactical trial strategy, a trial counsel is given wide latitude on how best to defend his client:

> No particular set of detailed rules for counsel's conduct can satisfactorily account for the variety of circumstances faced by defense counsel on the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decision.

Sullivan v. Fairman, 819 F.2d 1382,1390-91 (7th Cir. 1987) (quoting *Strickland*, 466 U.S. at 688-89).

A trial counsel's deficient performance prejudices the defendant's defense within the meaning of the Sixth Amendment when it deprived the defendant of a fair trial. *Fountain*

221 F.3d at 434. The deficient performance deprives the defendant of a fair trial when "there is a reasonable possibility that, but for counsel's . . . errors, the result of the proceeding would have been different," *Strickland*, 466 U.S. at 694, and that the proceeding was "'fundamentally unfair or unreliable.'" *Valenzuela*, 261 F.3d at 699 (quoting *Williams v. Washington*, [*27] 59 F.3d 673, 682 (7th Cir. 1995)). In other words, the court cannot conclude a trial counsel's deficient performance prejudiced the defense unless there is a reasonable possibility the outcome would have been different *and* the probability that the outcome would be different is sufficient to undermine confidence in the outcome of the proceeding. *Valenzuela*, 261 F.3d at 699 (quoting *Balzano*, 916 F.2d at 1292). A trial counsel's deficient performance does not prejudice the defense when his performance merely had a " 'conceivable effect' " on the outcome of the case. *Sullivan*, 819 F.2d at 1391 (quoting *Strickland*, 466 U.S. at 693). With this background in mind, the court will now review Smothers' ineffective assistance claim.

The court will first determine whether Smothers can show his trial counsel performed deficiently. If he is able to make this showing, the court will then determine whether the deficient performance prejudiced his defense. First, Smothers argues his trial counsel performed deficiently because he did not object when the prosecution played the 911 tape during its case-in-chief or when the prosecution commented during closing arguments on Smothers' refusal to answer the 911 operator's question concerning who stabbed Meyer. Smothers argues his trial counsel should have objected because the prosecution used his pre-custody silence as substantive evidence of guilt in violation of the Fifth Amendment's [*28] privilege against self-incrimination. The court concludes Smothers is correct when he asserts it would have been impermissible for the prosecution to use his pre-arrest, pre-custody silence as evidence of substantive guilt, but the court cannot conclude the prosecution actually used his silence for this purpose. Thus, any such objection would have lacked merit, and Smothers' trial counsel therefore did not perform

deficiently when he did not object. *See Trevino*, 60 F.3d at 339 (counsel does not act deficiently by failing to raise an objection that lacked merit).

The Self Incrimination Clause of the Fifth Amendment, which is applicable to the States through the Fourteenth Amendment, *Malloy v. Hogan*, 378 U.S. 1, 3 (1964), states in pertinent part, 'No person . . . shall be compelled in any criminal case to be a witness against himself. . . .' U.S. Const. amend. V, The privilege reflects the policy that our government will not "subject those suspected of crime to the cruel [dilemma] of self accusation [and] perjury," *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 55 (1964), and that our government should "shoulder the entire load" in a contest with an individual. *Id.* (quoting 8 Wigmore, Evidence (McNaughton rev., 1961), 317). [*29]

By its terms, the Fifth Amendment's privilege against self-incrimination bars the government in two primary facets. *Murphy*, 378 U.S. at 57 n.6. First, it bars the government from using "compulsion to elicit self-incriminating statements" in a criminal case. *Barter v. Palmigiano*, 425 U.S. 308, 326 (1976) (citing *Counselman v. Hitchcock*, 142 U.S. 547 (1892)). Second, it bars the government from using "self-incriminating statements elicited by compulsion" in a criminal case. *Murphy*, 378 U.S. 57 n.6 (citing *Haynes v. Washington*, 373 U.S. 503 (1963)). In both instances, the Fifth Amendment is violated only when the government is doing the "compelling" and the "using." *Id.*[3]

The privilege is colorably implicated whenever an answer to question would support a criminal prosecution or would provide "a link in the chain of evidence needed" to support a criminal prosecution. *Hoffman v. United States*, 341 U.S. 479, 486 (1951) (the privilege is "confined to instances where the

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[3] It is a well-settled principle that the amendments to the Constitution "protect only against invasion of civil liberties by the [State] whose conduct they alone limit." *Feldman v. United States*, 322 U.S. 487, 490 (1944).

witness has reasonable cause to apprehend danger from a direct answer"). There may be an invocation of the privilege whenever it is plain that a question, in the setting in which it was asked, would give a person reasonable cause to believe [*30] a responsive answer could result in a dangerous disclosure. As the Court stated in *Hoffman v. United States*:

> To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.

341 U.S. at 486-87. The privilege "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972). Whether the privilege is to be sustained is a legal determination. *Id.* The Fifth Amendment's privilege against self-incrimination "must be accorded liberal construction in favor of the right it was intended to secure." *Hoffman*, 341 U.S. at 486.

The Seventh Circuit has held on more than one occasion the Fifth Amendment's privilege against self-incrimination prohibits a prosecutor from using as substantive evidence of guilt a defendant's refusal to answer a particular question in a pre-custody, pre-silence, setting where the defendant was under no official compulsion to speak. *See Savory v. Lane*, 832 F.2d 1011, 1017-18 (7th Cir. 1987) (Fifth Amendment bars prosecution from using defendant's refusal [*31] to be interviewed by police in pre-arrest, pre-custody setting as substantive evidence of guilt); *United States v. Davenport*, 929 F.2d 1169, 1174 (7th Cir. 1991) (recognizing 'it violates the self-incrimination clause to allow into evidence testimony that the defendant refused to give a statement to the police" where there "was no implicit threat based on custodial situa-

tion"); *Ouska v. Cahill-Masching*, 246 F.3d 1036, 1047 (7th Cir. 2001) (prosecution may not use silence of defendant in non-arrest, non-custodial setting as substantive evidence of guilt). Other circuits courts have reached similar conclusions. *Coppola v. Powell*, 878 F.2d 1562, 1565-66 (1st Cir. 1989) (use of defendant's pre-arrest, pre-custody silence by prosecutor during case in chief violates Fifth Amendment's privilege against self-incrimination); *Combs v. Coyle*, 205 F.3d 269, 283 (6th Cir. 2000) ("use of a defendant's prearrest silence as substantive evidence of guilt violates the Fifth Amendment's privilege against self-incrimination"); *United States v. Burson*, 952 F.2d 1196, 1201 (10th Cir. 1991) (admission of evidence of defendant's refusal to talk to police in pre-custody, pre-arrest setting to show guilt violates Fifth Amendment); *see also United States v. Caro*, 637 F.2d 869, 876 (2d Cir. 1981) (strongly doubting it is permissible [*32] to use as evidence of guilt in government's case-in-chief a defendant's silence before he was arrested or taken into custody).[4]

These decisions by the Seventh Circuit and the other circuits that reached similar conclusions do not parse the text of the Fifth Amendment's Self-Incrimination Clause and explain with particularity how a prosecutor "compel[s]" a defendant to be a "witness against himself" in a "criminal case" when he uses the defendant's pre-arrest, pre-custody silence as substantive evidence of guilt. Nonetheless, it is not difficult to harmonize these holdings with the plain language of the Fifth Amendment. When a prosecutor invites the jury to infer the defendant is guilty because he refused to answer a question in a pre-arrest, pre-custody setting, he pressures the defendant to take the stand during trial and explain away the negative inference created by his silence. This [*33] pressure

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[4] At least three circuits have disagreed with the Seventh Circuit's decision in *Savory*. *United States v. Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996); *United States v. Oplinger*, 150 F.3d 1061, 1066-67 (9th Cir. 1998); *United States v. Rivera*, 944 F.2d 1563,1568 (11th Cir. 1991).

"compel[s]" the defendant to be a "witness" in a "criminal case."[5] Furthermore, when the defendant is compelled to take the stand and explain *why he was silent*, his explanation, if truthful, *may* be incriminating, depending on the nature of the particular question he refused to answer. It stands to reason that if it were evident from the implications of the particular question, in the setting in which it was asked, that a responsive answer by the defendant to the question could have been incriminating at the time he refused to answer it, it would be just as incriminating for the defendant to truthfully explain at trial why he refused to answer at the time it was asked. When the defendant's truthful explanation would be incriminating for this reason, the prosecution has not only [*34] compelled the defendant to be a "witness" in a "criminal case," it has compelled him to be a "witness *against* himself."[6] [*35]

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[5] In a case such as this one which does *not* involve the use at trial of self-incriminating statements elicited by compulsion, but rather involves the use of compulsion at trial (by the prosecutor) to elicit self-incriminating statements, a violation of the Fifth Amendment does not arise until the defendant is pressured *at trial* to take the stand and explain why he refused to answer a dangerous question. See *Withrow v. Williams*, 507 U.S. 680, 705 (1993) (noting the Fifth Amendment is a "trial right" and that "true Fifth Amendment claims" involve the "extraction" of "compelled testimony"); *Hiibelv. Sixth Judicial Dist. Ct.*, 2004 US LEXIS 4385, at *23 (2004) (the Fifth Amendment privilege against self-incrimination does not apply unless a communication is "compelled"); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) a violation of the Fifth Amendment occurs "only at trial"). The defendant is not "compelled" to be a "witness" in a "criminal case" when he refuses to answer a particular question in a pre-custody, pre-arrest setting where there is no official compulsion to speak; *Jenkins v. Anderson*, 447 U.S. 231, 250 n.4 (1980) (Marshall, J. dissenting) ("Of course the voluntary decision to remain silent in the absence of any official compulsion does not raise any issue under the Fifth Amendment" (other quotations omitted)).

[6] The Supreme Court appears to have employed a similar rationale

Therefore, the defendant may invoke the Fifth Amendment's protection against self-incrimination under such circumstances and prevent the prosecution from using his pre-

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when it held in *Griffin v. California*, 380 U.S. 609 (1965), that the "Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Id.* at 615. In *Griffin*, the Court faced a situation where the trial court allowed the prosecutor to invite the jury to infer the defendant was guilty because he refused to take the stand and explain away damning evidence. *Id.* at 610-11. The Court reasoned it was improper for the prosecutor to use the defendant's refusal to take the stand as evidence of his guilt (and for the trial court to abide this practice) because it penalized the defendant for exercising his right under the Fifth Amendment to not make incriminating statements in a criminal case. *Id.* at 614. The Court believed this practice "cuts down on the privilege by making its assertion costly." *Id.* The Court did detail how the prosecutor's use of the defendant's refusal to take the stand as substantive evidence of guilt "compelled" the defendant to be a "witness against himself" in a "criminal case"; nonetheless, the Court's holding can be harmonized with the plain language of the Fifth Amendment much in the same way *Savory's* holding can. When a prosecutor has the ability to use a defendant's refusal to take the stand as substantive evidence of guilt, he has the ability to pressure the defendant to take the stand during trial. This pressure constitutes "compul[sion]" to be a "witness" in a 'criminal case." Moreover, a defendant who decides not to take the stand during trial does so because he believes taking the stand will cause him to incriminate himself. Thus, by pressuring the defendant to take the stand, the prosecutor has "compelled" the defendant to be a "witness *against* himself" in a "criminal case." This is why the Court in *Griffin* concluded the prosecutor's ability to use the defendant's silence for this purpose made the decision to stay silent so "costly." Under the pre-*Griffin* regime, if the defendant resisted the pressure to take the stand, he had to suffer the prosecution's comments to the jury that he remained silent because he was guilty. Thus, the defendant was doomed either way.

arrest, pre-custody silence as substantive evidence of guilt.[7]

It is worth emphasizing that the prosecution does not run

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[7] The respondent argues under the Seventh Circuit's holding in *United States v. D.F.*, 63 F.3d 671 (7th Cir. 1995), the Fifth Amendment's privilege against self-incrimination bars the prosecutor from using the defendant's refusal to answer a question in a pre-arrest, pre-custody setting as substantive evidence of guilt only when the particular question he refused to answer was asked for the express purpose of obtaining an incriminating statement for use in a criminal prosecution. In *D.F.*, the Seventh Circuit was confronted with a situation where government workers at the mental hospital coerced the defendant to make certain incriminating statements. *Id*, at 673-75. In a pretrial motion, the defendant argued the Fifth Amendment barred the prosecutor from admitting these statements as evidence at trial. *Id.* at 675-76. The legal issue addressed by the Seventh Circuit concerned whether the Fifth Amendment barred a prosecutor from admitting these statements if they were not coerced for the purpose of obtaining incriminating statements for use in a criminal prosecution. *Id.* at 678. After reviewing the applicable case law, the Seventh Circuit held the Fifth Amendment prohibited the admission of the coerced statements only to the extent they were coerced for the purpose of obtaining statements for use in a criminal prosecution. *Id.* at 680-84.

D.F. is nothing like the case at bar. *D.F.* involved the facet of the Fifth Amendment that bars the government from using a self-incriminating statement elicited by compulsion in a criminal case. In the case at bar, the 911 operator, who was also a government employee, never coerced a self-incriminating statement from Smothers. The case at bar involves the facet of the Fifth Amendment that bars the government from using compulsion *at trial* to elicit self-incriminating statements. Thus, the issue of concern for the court revolves around whether the prosecutor's use of Smothers' pre-arrest, pre-custody silence compelled him to take the stand and explain the reason for his silence and whether Smothers' explanation for his silence, if truthful, would have been incriminating. The court is not concerned, in the context of this case, with the reasons why the 911 operator asked the particular question.

afoul with the Fifth Amendment simply because it compels the defendant to take the stand in a criminal case. For example, the prosecution might pressure the defendant to take the stand by introducing evidence obtained from sources other than the [*36] defendant that is so damning that the defendant believes he has to take the stand and explain away the evidence. This sort of compulsion does not run afoul with the Fifth Amendment because although the prosecutor is compelling the defendant to be a "witness" in a "criminal case," he is not compelling the defendant to be a "witness against himself." On the contrary, by taking the stand and trying to explain away the State's evidence, the defendant is being a witness *for* himself. After all, there is nothing inherently incriminating about taking the stand and explaining why facially damning evidence should not raise an inference of guilt. It is, however, inherently incriminating for a defendant to take the stand and explain why he refused to answer a particular question when, at that time it was asked, it was reasonable to believe if the question were answered in a responsive and truthful manner, it would have produced an [*37] incriminating statement that would have led to a prosecution or led to evidence that would have led to a prosecution.[8]

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[8] The Seventh Circuit's holding in *Savory* might arguably be harmonized with the plain language of the Fifth Amendment under an alternative rationale. The rationale would be if a prosecutor has the ability to use pre-arrest, pre-custody silence as substantive evidence of guilt, a defendant would feel pressured to give responsive answers during pre-arrest, pre-custody questioning rather than remain silent. However, it is difficult to see how this would result in a violation of the Fifth Amendment. Even if the defendant were to give a responsive, incriminating answer to a question in a pre-arrest, pre-custody setting because he believed a prosecutor might otherwise use his silence against him at a trial, his incriminating statement would not have been made in a "criminal case." *See Chavez v. Martinez*, 538 U.S. 760, 766-76 (2003) (a "criminal case" within the meaning of the Fifth Amendment "at the very

There are, however, two important instances where the prosecution *may* use a defendant's pre-custody, pre-arrest silence at trial without running afoul with the Fifth Amendment. First, when the defendant testifies at trial, he cannot prevent the prosecution from using his refusal to answer a particular question in a pre-arrest, pre-custody setting to impeach his trial testimony. In *Jenkins v. Anderson*, 447 U.S. 231 (1980), the Supreme Corn held the "the Fifth Amendment is not violated by the use of prearrest silence to impeach a criminal defendant's credibility." *Id.* at 238. The Court reasoned the Fifth Amendment's protection against self-incrimination could not be employed to enable the defendant to commit perjury on the witness stand. *Id.* at 237-38. Once the defendant decides to testify, the Court reasoned, he must do so fully and [*38] truthfully. *Id.* at 238. As such, the Court ruled the prosecution is free to ask the defendant to explain the reason for his pre-arrest silence for impeachment purposes. *Id.* at 238. The Court also reasoned because the defendant's refusal to speak occurred before he was in custody and given *Miranda* warnings, the issues confronted in *Doyle v. Ohio*, 426 U.S. 610 (1976), simply did not apply. *Id.* at 240.[9]

Second, when the defendant answers a particular question in an attempt to exculpate himself in a pre-arrest, pre-custody setting, he cannot prevent the prosecutor from using his refusal to answer related follow-up questions during its case-in-chief for the purpose of placing the defendant's exculpatory answer into context. In *United States v. Davenport*, 929 F.2d 1169 (7th Cir. 1991), the Seventh Circuit faced a situation where the prosecutor used during its case-in-chief the defen-

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least requires the initiation of legal proceedings" and does not include "police questioning").

[9] In *Doyle*, the Court held the prosecutor's use of a defendant's silence that occurred after arrest to impeach the defendant's exculpatory trial testimony violates the Due Process Clause of the Fourteenth Amendment. 426 U.S. at 619.

dant's refusal to answer certain questions posed by an IRS agent relating to unusually large deposits the defendant and her husband made. *Id.* at 1171-74. The IRS agent asked the defendant the question in a pre-arrest, pre-custody setting. The defendant agreed to answer the IRS agent's questions at first in an attempt to exculpate herself, but later, when the questions became [*39] uncomfortable, she stopped answering and invoked the Fifth Amendment privilege against self-incrimination. *Id.* The Seventh Circuit held it was permissible under the circumstances for the prosecutor to comment on the defendant's silence during its case-in-chief. *Id.* at 1174-75. The court reasoned once the defendant headed "down the self-exculpation road," she could not "attempt to gain an advantage in the criminal process" by making selective statements followed by "clamming up." *Id.* at 1174. The court explained:

> The privilege against self-incrimination is not a privilege to attempt to gain an advantage in the criminal process, whether in its investigatory or its trial stage, by selective disclosure followed by a clamming up. Having voluntarily given the agent their version of the events, the Davenports forfeited their privilege not to answer questions concerning that version.

Id. at 1174-75.

Turning now to the merits of Smothers' claim, the court, as an initial matter, has little trouble concluding it would have been improper for the prosecution to use Smothers' refusal to answer the 911 operator's question about whether he knew who stabbed Meyer as substantive evidence of guilt. It is clear to the court that given the implication of the 911 operator's question, in the setting in which it was asked, it was reasonable for Smothers to believe a responsive answer to the question might have been incriminating and used [*40] against him in a criminal case. After all, the 911 operator's question concerned who stabbed Meyer, and a responsive answer to that question certainly posed a danger for Smothers. Furthermore, it was reasonable for Smothers to believe a

responsive answer would have found its way to the prosecutor given that 911 calls are taped and that authorities have access to them. In fact, the 911 tape did find its way to the prosecution in this case and was used against Smothers during trial. Thus, just as it would have been incriminating for Smothers to answer the 911 operator's question at the time it was asked, it would have been incriminating for him to truthfully testify at trial as to why he refused to answer the question at the time it was asked. Accordingly, it would have been impermissible for the prosecution to pressure Smothers to do so by using his refusal to answer the 911 operator's question as substantive evidence of guilt.

However, the court is unable to conclude the prosecution used Smothers' silence for this purpose. A prosecutor "uses" a defendant's pre-arrest silence when he remarks on the silence and (1) it was his manifest intention to do so, or (2) the remark was of "such character that the jury would 'naturally and necessarily' take it to be a comment on the defendant's silence." *United States ex rel. Smith v. Rowe*, 618 F.2d 1204, 1210 (7th Cir. 1980) (quoting *United States v. Edwards*, 576 F.2d 1152, 1154 (5th Cir. 1978)). It is not enough that the jury [*41] is aware of the silence, for there to be "use" of the silence, the prosecutor must exploit it. *See Lindgren v. Lane*, 925 F.2d 198, 202 (7th Cir. 1991). Here, the prosecution never made a remark about Smothers' pre-arrest silence during its case-in-chief. It did play the entire 911 tape at the end of Cook's direct examination, but it did so for the apparent purpose of corroborating her testimony. There is no reason to conclude the mere playing of the tape constituted a remark on Smothers' pre-arrest silence, and there is no reason to conclude the jury would naturally and necessarily take the playing of the tape as such a remark. Suffice it to say, the prosecution did not exploit Smothers' pre-arrest silence during its case-in-chief and therefore did not "use" the silence in a way that ran afoul with the Fifth Amendment's privilege against self-incrimination.

In addition, the prosecution used Smothers' pre-arrest silence during closing arguments in ways permitted by *Jenkins*

and *Davenport*. The prosecutor used Smothers' refusal to answer the 911 operator's question to impeach his trial testimony by suggesting if Smothers truly acted in self-defense, he would not have attempted to distance himself from the stabbing when talking to the 911 operator: [*42]

> The dispatcher talks to him a little bit later, and he says, well, I'm not ready to make no statement. That point he says I'm not ready to make no statement. Already Mr. Smothers in his own way is starting to think how he's going to extricate himself from this situation, a very difficult situation.
>
> He's got a dead body out in the driveway. There's blood all over the place. He can't move that body. He can't move himself. He can't get rid of all the blood all over himself. He's already–his mind is working a little bit saying I'm not ready to make no statement. That's March 23.

(Sept. 12, 1996, Tr., at 44.) As such, this use of Smothers' pre-arrest, pre-custody silence was permitted by *Jenkins*.

The prosecutor also used Smothers' pre-arrest silence to place his voluntary, exculpatory answers to the 911 operator's questions into context. As the record plainly shows, Smothers voluntarily took the phone from Cook to speak with the 911 operator. The first question the 911 operator asked was, "what happened?" Rather than remaining silent, Smothers tried to exculpate himself by telling the 911 operator, "the dude got stabbed," which was worded in a way that suggested someone other than he was responsible for the stabbing. It should have been foreseeable to Smothers that the 911 operator would follow-up his question of "what happened" with questions concerning "who," "where," "when," "why," and "how." Thus, Smothers could not simply clam up once the 911 operator got to the "who stabbed him" question and expect the Fifth [*43] Amendment to bar the prosecutor from using his silence to place his earlier exculpatory answers into context. And this is precisely what the prosecutor did during closing arguments. The prosecutor's argument was

that Smothers was trying to conceal the fact that he was responsible for stabbing Meyer when he told the 911 operator "the dude got stabbed." The prosecutor argued Smothers' refusal to answer the 911 operator's "who" question further demonstrated that Smothers had been trying to hide the fact that he stabbed Meyer from the moment he started answering the 911 operator's questions:

> The 911 call. That shows a lot. That 911 call, that perhaps 30 second, 45 seconds where you hear Mr. Smothers on the call, tells you volumes. Tells you volumes about the state of mind of Mr. Smothers and what happened that night.
>
> . . . . He says the dude got stabbed. His–he got stabbed. It's not like I stabbed him. He got stabbed, like the knife somehow or somebody else stabbed him. I'm not responsible. He got stabbed. I didn't do it.
>
> . . . . The dispatcher talks to him a little bit later, and he says, well, I'm not ready to make no statement. That point he says I'm not ready to make no statement. Already Mr. Smothers in his own way is starting to think how he's going to extricate himself from this situation, a very difficult situation.

(Sept. 12, 1996 Tr., at 43-44.) As such, this use of Smothers' pre-arrest silence was permitted by *Davenport*. Because the record does not show the prosecutor did anything objectionable under the Fifth Amendment when he played the 911 [*44] tape during his case-in-chief or when he commented on Smothers' pre-arrest, pre-custody silence during closing arguments, the court cannot accept Smothers' argument that his trial counsel performed deficiently when he did not to object to these actions by the prosecution.

Second, Smothers argues his trial counsel performed deficiently when he did nor object to the prosecution's use of Smothers' post-arrest silence as impeachment evidence. Smothers argues the prosecution's actions violated the Due

Process Clause of the Fourteenth Amendment. The court agrees. In *Doyle v. Ohio*, 426 U.S. 610 (1976), the Supreme Court held a prosecutor's use of a defendant's silence at the time of arrest to impeach his trial testimony violates the Due Process Clause of the Fourteenth Amendment. 426 U.S. at 619. The Seventh Circuit has held the *Doyle* rule extends from the time of arrest through trial. *United States ex rel. Smith v. Franzen*, 660 F.2d 237, 239 (7th Cir. 1981). The reasoning that underlies the *Doyle* rule is once a defendant is given his *Miranda* rights to remain silent, it is fundamentally unfair for the prosecution to use that silence against him at trial for purposes of impeachment. *Doyle*, 426 U.S. at 619. A prosecutor "uses" a defendant's post-arrest silence when he remarks on the silence and (1) it was his manifest intention to refer to the [*45] silence, or (2) the jury would naturally and necessarily take it to be a remark on the defendant's silence. *Rowe*, 618 F.2d at 1210.

Smothers argues the following statements by the prosecutor during closing arguments constituted a remark on his post-arrest silence for purposes of impeachment:

> Yesterday, September 11th, a long time has passed since March 23rd, since then Mr. Smothers has been charged. He's become represented by Mr. Rose. He's had an opportunity to get and review the police reports, the witness statements, and now he's ready to make a statement. I was in danger of being killed. I believed my life was in danger. That is his statement September 11th of 1996.
>
> . . . .
>
> . . . .
>
> Mr. Smothers knows when he's testifying that the only other person who was involved in this incident is not going to contradict him. He knows after five months, five-plus months that he can give a statement now, he can talk about that incident, and he knows that James Meyer is not going to stand up and say,

> wait a minute, ladies and gentlemen, it didn't happen that way.

(Sept. 12, 1996, Tr., at 44-45.) Here, the court has little trouble concluding the prosecutor's remarks would "naturally and necessarily" be taken by the jury to be a reference to Smothers' post-arrest silence for purposes of impeachment. The prosecutor noted on two separate occasions that Smothers was "now" making a trial statement about acting in self-defense five months after the stabbing. The prosecutor noted Smothers had "since March 23rd" to review [*46] police reports and other evidence and "now" on "September 11th of 1996" was "ready to make a statement" about being "in danger of being killed." Then, as if to make sure the point was not lost on the jury, the prosecutor noted Smothers "knows after five months, five-plus months" he could "give a statement now" and "talk about that incident. . . ." There can be no doubt that a jury hearing these arguments would understand them to be remarks on Smothers' failure to make any sort of statement about acting in self-defense during the five months prior to his trial. Accordingly, the court is obliged to conclude the prosecutor used Smothers' post-arrest silence to impeach his exculpatory trial testimony in violation of the Due Process Clause of the Fourteenth Amendment.

Having concluded the prosecution improperly used Smothers' post-arrest silence to impeach his trial testimony, the court must now determine whether Smothers' trial counsel performed deficiently by not making an objection. Although the court does not reach its conclusion lightly, it is obliged to conclude Smothers' attorney performed deficiently by failing to make the objection. It is true there is no record to show why Smothers' attorney failed to object to this line of argument, but the court, in this particular case, cannot presume the failure to object was part of a reasonable trial strategy. In a close case like this, which hinged greatly–if not entirely–on the credibility of Smothers' trial [*47] testimony, it would simply have been unreasonable for Smothers' trial

counsel to let the prosecutor impeach Smothers' testimony with his post-arrest silence. Accordingly, the court concludes Smothers' trial counsel performed deficiently by failing to raise an objection.

Third, Smothers argues his trial counsel performed deficiently because he did not object when the prosecution called Smothers a cold blooded liar during closing arguments. The court cannot agree. A prosecutor violates a defendant's due process rights by making egregiously improper statements during closing argument. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). However, "a prosecutor may draw reasonable inferences from the evidence adduced at trial, even going so far as to call a defendant a liar if the record supports that accusation." *United States v. Andreas*, 216 F.3d 645, 671 (7th Cir. 2000). "[T]he government is allowed to comment on the credibility of a witness, including the defendant, as long as the comment reflects reasonable inferences from the evidence adduced at trial rather than personal opinion." *United States v. Goodapple*, 958 F.2d 1402, 1409-10 (7th Cir. 1992). Suffice it to say the evidence of Rains' testimony and the jailer's medical screening report were sufficient to permit a comment by the prosecution that Smothers was lying about not smoking marijuana. Accordingly, such an objection to the [*48] prosecutor's comment would have lacked merit, and Smothers' counsel did not perform deficiently by not objecting to it.

Fourth, Smothers argues his trial counsel performed deficiently because he did not object when the prosecution said Smothers would jump for joy if he were convicted of a lesser crime. Smothers argues the prosecution's statement was constitutionally improper. The court cannot agree. The prosecutor was simply arguing the evidence introduced at trial supported a conviction of first-degree intentional homicide, and therefore a verdict for anything less than that would let Smothers off the hook, as it were. There was nothing improper about this argument, and his counsel did not perform deficiently by not objecting to it.

Having concluded Smothers' trial counsel performed deficiently only when he failed to object to the prosecution's use of Smothers' post-arrest silence to impeach his trial testimony, the court must now determine whether this deficient performance prejudiced his defense. On the record before it, the court is obliged to conclude Smothers' attorney's failure to object to the prosecution's use of his post-arrest silence to impeach his trial testimony deprived Smothers of a fair and reliable trial. The evidence against Smothers was not overwhelming. There were no witnesses to the stabbing and Smothers' version of events was not implausible. In fact, the prosecution's case hinged almost entirely on the [*49] credibility of Smothers' trial testimony. In a case such as this one, there is a fair probability that the jury would have been persuaded by the prosecutor's improper argument and believed if Smothers had truly acted in self-defense, he would have notified the authorities of this fact prior to trial. As such, the court is obliged to conclude there is a fair probability that but for the prosecutor's improper argument, the outcome of Smothers' trial would have been different. The court further concludes the probability that the outcome would have been different is sufficient to undermine confidence in the outcome. As such, the court concludes Smothers' trial counsel's failure to object to the prosecutor's use of his post-arrest silence to impeach his trial testimony prejudiced his defense and rendered his performance ineffective within the meaning of the Sixth Amendment. In summary, Smothers has satisfied the requirement that he show he "is in custody in violation of the Constitution . . . ." within the meaning of § 2241(c)(3).

The final requirement Smothers must satisfy to obtain the writ of *habeas corpus* is to show § 2254(d) does not preclude the court from granting the writ. Section 2254(d) reads in its entirety:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be [*50] granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the

claim–

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A State prisoner's claim was "adjudicated on the merits in State court proceedings" within the meaning of § 2254(d) when the State court resolved the claim on substantive grounds, regardless of the reasoning process used to resolve the claim. *Searcy v. Jaimet*, 332 F.3d 1081, 1087 (7th Cir. 2003); *Hough v. Anderson*, 272 F.3d 878, 898 n.7 (7th Cir. 2001); *see also Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997). There is no adjudication "on the merits" within the meaning of § 2254(d) if the State court disposed of the petitioner's claim on procedural grounds, however. *Braun v. Powell*, 227 F.3d 908, 916 (7th Cir. 2000); *Liegakos v. Cooke*, 106 F.3d 1381, 1385 (7th Cir. 1997). In addition, there is no adjudication "on the merits" if the State court never addressed the petitioner's claim. *Dye v. Frank*, 355 F.3d 1102, 1007 (7th Cir. 2004) (citing *Moore v. Parke*, 148 F.3d 705, 708 (7th Cir. 1998)); *Ouska*, F.3d at 1046. [*51]

"[C]learly established Federal law, as determined by the Supreme Court of the United States" within the meaning of § 2254(d)(1) refers to a rule of law that was clearly established at the time the petitioner's State court conviction became final. 28 U.S.C. § 2254(d); *Williams*, 529 U.S. at 390 *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003) (the phrase "clearly established Federal law" means the governing "legal principle" or "principles" set forth by the Supreme Court at the time the State court renders its decision."); *Yancey v. Gilmore*, 113 F.3d 104, 106 (7th Cir. 1997) (As the plain language of § 2254(d)(1), it refers to law as determined by the

Supreme Court of the United States," not the U.S. Courts of Appeals or district courts). Only "the holdings, as opposed to the dicta," of the Supreme Court's decisions qualify as "clearly established Federal law" within the meaning of § 2254(d)(1). *Searcy v. Jaimet*, 332 F.3d 1081, 1087-88 (7th Cir. 2003) (quoting *Williams v. Taylor*, 529 U.S. 362 (2000)).

A State court decision is "contrary to" clearly established Supreme Court precedent within the meaning of § 2254(d)(1) when it "arrives at a conclusion opposite to that reached by [the Supreme Court] on the question of law" or "confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [the Supreme Court]." *Williams*, 529 U.S. 362 (2000); *Anderson v. Cowan*, 227 F.3d 893, 896 (7th Cir. [*52] 2000). The mere fact that the State court decision uses "shorthand" reference or is a bit imprecise about the legal standard set forth by the Supreme Court does not automatically render it "contrary to" Supreme Court law within the meaning of § 2254(d)(1). *Viciotti*, 537 U.S. 19, 23 (2002). The district court presumes the State court knows and follows federal law, and it will not be quick to conclude that the State court applied an inconsistent standard. *Woodford v. Viciotti*, 527 U.S. 19, 23 (2002). In fact, the State court does not even need to be aware of Supreme Court precedents so long as the reasoning and the result of the decision are not contrary to them. *Early v. Packer*, 537 U.S. 3, 8 (2002). Whether the State court's decision was "contrary to" Supreme Court precedent is a legal determination. *Schaff v. Snyder*, 190 F.3d 513, 522 (7th Cir. 1999).

The provisions set forth in § 2254(d) are non-jurisdictional and are akin to affirmative defenses in that they may be waived. *See Watkins v. Meloy*, 95 F.3d 4, 6 (7th Cir. 1996) ("The provisions of the [AEDPA] governing the scope of federal judicial review do not affect the subject matter jurisdiction of the federal courts, and are therefore waivable."); *see also Emerson v. Gramely*, 92 F.3d 898, 900 (7th Cir. 1996) (issue of whether § 2254(d) precludes relief is waived when State does not ask court of appeals to consider the matter); *Mason v. Hanks*, 97 F.3d [*53] 887, 892 n.1 (7th Cir.

1996). If the respondent waives this defense, the court will not raise it *sua sponte*.

Here, the respondent raises the § 2254(d) defense in his answer, and the Wisconsin Court of Appeals, in its February 20, 2002 decision, adjudicated the merits of Smothers' claim that he received ineffective assistance when his trial counsel did not object to the prosecution's use of his post-arrest silence to impeach his exculpatory trial testimony. The Wisconsin Court of Appeals' decision accurately set forth the Supreme Court's precedent in *Strickland*, which was the clearly established law that governed Smothers' ineffective assistance claim:

> To establish a claim of ineffective assistance, an appellant must show that counsel's performance was deficient and that it prejudiced the defense. To prove deficient performance, an appellant must show that his or her counsel made errors so serious that he or she was not functioning as the counsel guaranteed by the Sixth Amendment. Even if deficient performance is found, a judge of conviction will not be reversed unless the appellant proves that the deficiency prejudiced his or her defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. It is not ineffective assistance to fail to bring a motion or raise an objection which would have lacked merit.

(Respondent's Answer, Ex. U, at 3 (citations and quotations omitted).) The Wisconsin Court of Appeals then rejected Smothers' claim on the ground the prosecutor did not improperly use Smothers' post-arrest silence: [*54]

> Smothers' . . . argument is that his trial counsel rendered ineffective assistance when he failed to object to portions of the prosecutor's closing argument which, according to Smothers, suggested to the jurors that they should infer Smothers' guilt based upon his postarrest invocation of his rights . . . to remain silent . . . .

> No evidence was admitted at trial indicating that Smothers had invoked . . . his right to remain silent after being arrested and being informed of his *Miranda* rights. However, Smothers contends that the prosecutor's argument impermissibly drew the jury's attention to the fact that he had remained silent from the time of the stabbing to the time of trial, and improperly used this information to discredit his self-defense claim and imply that he was guilty.
>
> We reject this argument because . . . the prosecutor did not rely on Smothers' invocation of his rights to silence . . . or contend that Smothers' silence demonstrated his guilt. Instead, he argued that Smothers' failure to assert that he was attacked and acting in self-defense until after reviewing discovery materials and going to trial permitted an inference that he fabricated the defense to fit the other evidence in the case. He contrasted Smothers' testimony at trial with his statements when reporting the stabbing, including his failure to tell his neighbor or the 911 dispatcher that he was attacked and acting in self-defense. This was a legitimate and permissible argument based upon the facts. Trial counsel was not deficient for failing to object to it.

(*Id.* at 5-6).

The Wisconsin Court of Appeals, in the course of rejecting Smothers' claim, did not mention or discuss *Doyle*, which is the clearly established Supreme Court precedent that governs his claim. This fact, in and of itself, is inconsequential because the court presumes the State court knows the clearly [*55] established law. What is of consequence, however, is that the Wisconsin Court of Appeals' decision arrives at a conclusion of the law that is contrary to *Doyle*. The Wisconsin Court of Appeals' decision states it was "legitimate and permissible" for the prosecutor to argue "Smothers' failure to assert that he was attacked and acting in self-defense until after reviewing discovery materials and going to trial permit-

ted an inference that he fabricated the defense to fit the other evidence in the case." *Id.* On the contrary, *Doyle* clearly states it is *impermissible* for a prosecutor to use a defendant's silence after arrest to raise an inference that he fabricated his exculpatory trial testimony. *Doyle*, 426 U.S. at 619. Accordingly, the Wisconsin Court of Appeals' adjudication of Smothers' claim "resulted in a decision that was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States . . . ." 28 U.S.C. § 2254(d)(1). As such, the provisions of § 2254(d) do not preclude the court from granting the writ.

In light of the foregoing, the court will grant Smothers' petition for the writ of *habeas corpus* and vacate the judgment of conviction for second-degree murder entered November 19, 1996, by the Circuit Court of Kenosha County, Wisconsin. The writ shall issue 90 (ninety) days from the date of this order [*56] unless Smothers is brought to trial beforehand. If Smothers is not brought to trial within 90 (ninety) days from the date of this order, the writ shall issue.

Accordingly,

IT IS ORDERED that Smothers' petition for the writ of *habeas corpus* be and the same is hereby **GRANTED**;

IT IS FURTHER ORDERED that the judgment of conviction entered November 19, 1996, by the Circuit Court for Kenosha County, Wisconsin, be and the same is hereby **VACATED**; and

IT IS FURTHER ORDERED that the writ of *habeas corpus* shall issue 90 (ninety) days from the date of this order unless the State of Wisconsin brings Smothers to trial beforehand; if Smothers is not brought to trial within 90 (ninety) days from the date of this order, the writ shall issue.

The clerk is directed to enter judgment accordingly.

Dated in Milwaukee, Wisconsin, this 30th day of June 2004.

BY THE COURT

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J. P. Stadtmueller
U.S. District Judge